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REPORT

OF

The Commission to Codify and Revise the Law of Decedents' Estates

APPOINTED UNDER AUTHORITY OF THE

ACT OF THE GENERAL ASSEMBLY OF PENNSYLVANIA

Approved April 23, 1915, P. L. 177

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TABLE OF CONTENTS.

PAGE

REPORT TO THE GENERAL ASSEMBLY 1

PRELIMINARY NOTES TO THE SEVERAL ACTS:

- Intestate Act 5
- Wills Act 8
- Fiduciaries Act 9
- Partition Act 12
- Revised Price Act 13
- Register of Wills Act 13
- Orphans' Court Act 14

INTESTATE ACT 15

WILLS ACT 54

FIDUCIARIES ACT 82

PARTITION ACT 287

REVISED PRICE ACT 335

REGISTER OF WILLS ACT 362

ORPHANS' COURT ACT 387

To the General Assembly of the Commonwealth of Pennsylvania:

The undersigned were on October 4, 1915, appointed by his excellency, the Governor, in accordance with the Act of April 23, 1915, P. L. 177, as Commissioners to codify and revise the law of decedents' estates, whether testate or intestate, and to report the same to the next General Assembly, and to recommend such changes in the existing law as may to such Commission seem desirable. We have now the honor to submit our report, which we beg leave to preface with a few explanatory remarks.

On March 23, 1830, the General Assembly adopted a joint resolution, printed in the Pamphlet Laws of 1830, page 408, by which the Governor was authorized to appoint three persons as Commissioners to revise, collate and digest all such public acts and statutes of the civil code of this State and all such British Statutes in force in this State as are general and permanent in their nature. In accordance with this resolution the then Governor, the Honorable George Wolf, appointed William Rawle, Thomas I. Wharton and Joel Jones as such Commissioners, who subsequently reported a large number of draft Acts, five of which, relating to our present subject, were substantially adopted by subsequent Legislatures as the Act of March 15, 1832, P. L. 135, entitled An Act Relating to Registers and Registers' Courts; the Act of March 29, 1832, P. L. 190, entitled an Act Relating to Orphans' Courts; the Act of April 8, 1833, P. L. 249, entitled An Act Relating to Last Wills and Testaments; the Act of April 8, 1833, P. L. 315, entitled An Act Relating to the Descent and Distribution of the Estates of Intestates, and the Act of February 24, 1834, P. L. 70, entitled An Act Relating to Executors and Administrators.

These acts were drafted with great care and consummate skill, and have served for over eighty years as the substratum of our law of decedents' estates and connected subjects; but during this long period of time the law has

been amended by the passage of more than two hundred Acts of Assembly, has been elucidated and applied in countless judicial decisions, and has been necessarily affected by the cumulative changes in legal practice and public opinion. The present would therefore seem an appropriate time to re-examine the entire subject, to repeal statutes which are either dead letters in the books or prejudicial in their effect, to consolidate those that should be retained and to revise the entire system by the cautious introduction of new legislation.

The act under which we were appointed uses the words "to codify and revise;" and as the word "code" is often used in different meanings, we beg leave to observe, that as we have understood the legislative intention, we were not expected to reduce to the form of a code those general principles which lie at the basis of jurisprudence, a task that would indeed be beyond our powers, even if its accomplishment were desirable. We have considered that we were merely expected to arrange this branch of the law in an orderly and systematic form, to relieve it from obscurity and inconsistency, and thus to render its application easier and more definite.

In our endeavor to fulfil the difficult and responsible task thus imposed upon us, we have in many ways been guided by the example of the Commissioners of 1830, and particularly in this: We have avoided making any change in the phraseology of the existing statutes unless some definite and substantive change in the purpose of the law itself was intended, even where some other words or expressions might seem better adapted to express that purpose. Our obvious reason has been that the phraseology of the older statutes, much of which the Commissioners of 1830 copied from prior statutes as early as those of 1705, 1794 and 1797, has acquired through long use and judicial decision a settled and determinate meaning, which should not be disturbed through any desire to attain mere elegance of diction; and, indeed, this course was expressly enjoined upon the Commissioners of 1830 by the Resolution of the General Assembly, which provided that in the revision of the

statutes "no such change shall be made in their phraseology by which their true intent and meaning shall in any wise be impaired, altered or affected, except in those instances in which it shall be expressly intended and proposed to amend or change the existing provisions of such statutes." This principle has however been adhered to with greater strictness in revising those statutes which relate to substantive law than in case of those which merely regulate procedure; and, throughout, some verbal changes have been made for the sake of brevity and clearness, where no alteration of the meaning is involved.

Upon another point we would also refer to the judicious language of the Commissioners of 1830, where they stated their belief that the Legislature desired to possess not only a revised and consolidated code, but one systematized as to subject matter and arranged into regular and appropriate titles each of which shall contain all that naturally belongs to it and no more.

Our duty has been "to codify and revise the law of decedents' estates, whether testate or intestate." As soon, however, as we undertook that duty, we found that it was difficult, if not impossible, to perform it without apparently exceeding the scope of our appointment. We discovered that many statutes applied not merely to the estates of decedents, but in a broader way to other subjects; we could not touch one without touching another, and yet if we omitted such statutes altogether, our work would have been rendered obviously imperfect. For example, the Act of April 18, 1853, P. L. 503, commonly called the Price Act, relates not merely to sales of real estate where the real estate has been acquired by descent or will, but also to cases where the title has been acquired by deed, in which case jurisdiction is vested in the Courts of Common Pleas; and yet by far the greater number of the cases to which the Act applies arise under wills. In this case, we have assumed that our inclusion of such a statute in our work of revision was virtually intended by the Legislature and therefore submit our report with this explanation.

So far as concerns our recommendations for substantive changes in the law, we have endeavored to be conservative,

and yet have not hesitated to suggest important changes where we thought them distinctly beneficial. It has been often said, and with truth, that the burden of proof is upon him who advocates a change in the law, and this rule is distinctly applicable to that department of the law which has been referred to us. For the law of decedents' estates in this Commonwealth is and has been for many years, certainly since the Revised Acts drafted by the Commissioners of 1830, most admirable in its theory, and in practice most satisfactory to the community. We have therefore been careful to limit our recommendations to those changes, which we felt after our careful deliberations and unanimous conclusions would meet with the approval of the representatives of our fellow citizens, and deserve a practical trial. We have further endeavored to obtain from those best qualified to make suggestions their aid and counsel, and to this end immediately on our appointment addressed the Judges of the Supreme, Superior, Common Pleas and Orphans' Courts of the Commonwealth, and caused an advertisement of our appointment to be inserted in our principal legal journals as notice to the Bar. All the suggestions that we have received in this way have been carefully considered and many of them have been adopted by us.

It gives us pleasure also to acknowledge our indebtedness to the Legislative Reference Bureau for much valuable assistance.

In thus laying before the General Assembly the accompanying drafts, we would express our fear lest the complexity and difficulty of our subject may have caused us to omit matters that should have been included. But we hope that such are not numerous or, comparatively speaking, important, and that the work as a whole may meet with the approval of the General Assembly and prove beneficial to the Commonwealth.

JOHN MARSHALL GEST,
GEORGE E. ALTER,
THOMAS J. BALDRIGE,
Commissioners.

SAMUEL D. MATLACK,
Law Clerk and Secretary.

FEBRUARY 1, 1917.

PRELIMINARY NOTE TO THE SEVERAL ACTS.

Intestate Act.

In this revised Act, the Commissioners have followed the phraseology of the existing statutes in accordance with their resolution to make, as a general rule, only such verbal changes as might be necessary where a substantive change of the law is intended.

It is well at this point to note two important changes which affect the entire Act. The first is that the same scheme of inheritance is provided for both real and personal estate, thus ignoring the distinction that exists at present by which the interests of the surviving spouse or of parents are in some cases restricted to a life interest in the realty while their interests in the personal estate are absolute.

The reason for this distinction is purely historical; the common law rules of inheritance of real estate came through the feudal law, while the statutes of distribution of personal estate were derived through the Roman law, and were in England administered by the Ecclesiastical Courts and the Court of Chancery. Many of the resulting distinctions have long since been abolished in this Commonwealth, and it is now suggested that a further step be taken, in thus providing that the interests of those entitled shall be in fee in both realty and personalty. However venerable the origin of the present law may have been, the Commissioners think that the difference has now become purely arbitrary and produces an artificial inequality. It is a pure accident whether at the moment of a man's death his property consists of lands or stocks and bonds, of ground rents issuing out of land or mortgages secured upon lands; all these are merely forms of property and the rights of heirs and next of kin should not be affected by matters of accident rather than of substance. Land, owing chiefly to its characteristic of immobility, may properly, and indeed sometimes must, be subject to different rules from personalty in such matters as the method of taxa-

tion or conveyance, the regulation of liens, mortgages or pledges; but in such cases there is an inherent reason for the difference, which finds no place in a logical plan of inheritance or succession. We, therefore, recommend to the Legislature that all property where the owner dies intestate shall descend or be distributed according to one system. This, in the words of a distinguished legal scholar, Frederic W. Maitland, "is what a civilized jurisprudence requires, and here as always scientific jurisprudence is on the side of convenience and common sense."

The second important change which the Commissioners recommend is that the reciprocal rights of husband and wife in each other's intestate estate should be the same. Under the present law, the widow, if there be no issue, takes one-half of the real estate for life and one-half of the personal estate absolutely, and in addition, under the recent Act of April 1, 1909, P. L. 87, 5 Stew. Purd. 6476, five thousand dollars in real or personal estate as she may elect, before the division of the remainder of the estate. If there be issue, the widow takes one-third of the real estate for life and one-third of the personal estate absolutely. The surviving husband, on the other hand, if there be no issue takes all his wife's real estate for life as tenant by the curtesy, and all the personal estate absolutely, while if there be issue the husband divides the personal estate with the children share and share alike, that is he takes a child's share. These provisions are the resultant of the gradual growth and changes in our law during many years and their complexity is in practice greatly increased by the different rights given to the surviving husband and wife in electing to take against the will of the other; the wife having the right to take the same share of her husband's estate real and personal as she would have taken had he died intestate; while the surviving husband, in case he elects to take against his wife's will has not the right to take as in cases of intestacy, but may choose either to take the real estate as tenant by the curtesy or the same

share of her estate as she might take of his estate, in case she took against his will. There is no apparent reason why the reciprocal rights of husband and wife in each other's intestate estate should be so different, and the Commissioners are of opinion that they should be simplified; that there should be given to the surviving husband or wife, in case of intestacy, the same right in the estate, real and personal, of the other, and the same right in cases of testacy, to take under the intestate law. The Commissioners have embodied such a provision in their draft of the new Wills Act submitted herewith, and it is suggested that these changes will reduce our law upon the subject to a symmetrical and harmonious plan.

While they are not so fundamental, other changes are recommended which deserve particular notice.

In Section 1 (*a*), it is provided that where an intestate leaves a surviving spouse and issue one child only, or descendants of one child, the spouse shall take one-half instead of one-third of the estate.

In Section 2, the special allowance of $5000 to a surviving spouse where there is no issue is restricted to the case of actual intestacy, and no longer applies when the surviving spouse elects to take against the will. The procedure for the appraisement and setting apart of the property specially allowed is defined with greater exactness than under existing laws.

In Section 4, the rights of a surviving husband in remainder estates vested in his deceased wife are extended so as to be uniform with those of a surviving wife.

In Section 9, the distinction in the inheritance of real estate between the whole and half blood is abolished; and in Section 13 the rule at present surviving in some cases as to the restriction of inheritance to persons of the blood of the first purchaser is likewise abolished.

In Section 15, the right of inheritance in cases of illegitimacy is extended to the maternal grandfather, and illegitimate children are legitimated by the marriage of their parents without the present requirement of cohabitation.

In Section 16, the rights of adopted children are more accurately defined in accordance with the present legislative policy.

In Section 23, it is provided that no murderer shall inherit from the person whom he has killed—the present law on this subject seeming to the Commissioners to be opposed to the sentiments of morality.

Both this and the proposed Wills Act are made operative only upon the estates of persons dying on or after a day named, subsequent to the approval of the Acts.

Wills Act.

The present law on this subject has proved so satisfactory that the Commissioners have recommended few changes of a fundamental nature. The law however has been codified, revised, and arranged in logical form. Some important changes should, however, be indicated.

In Section 2, it is provided that the presence of dispositive words after the signature of a testator shall not, even if they are written before the execution of the instrument, invalidate that which precedes the signature.

In Section 6, the period before death when a will for religious or charitable uses may be executed has been made thirty days instead of a calendar month.

In Section 8, the appointment of testamentary guardians is regulated and the rights of father and mother rendered more uniform.

In Section 15, the law on the subject of lapsed legacies and devises has been revised and the phraseology of existing statutes amended, especially in cases where the lapse occurs in the residuary clause or bequest and an intestacy results under the present law. According to the revised act, the lapsed share will pass to the other residuary legatees or devisees.

In Section 16, the rights of adopted children are extended to cases of a general devise or legacy to children when the contrary intention does not appear by the will.

In Section 17, provision is made for the payment of pecuniary legacies from real estate not specifically

devised, when no contrary intention appears in the will.

In Section 18, it is provided that a devise of mortgaged real estate shall in all cases be subject to the mortgage and that the mortgage shall not be paid from the personal estate in the absence of a direction to that effect.

In Section 19, it is provided that in the case of so-called spendthrift trusts, the income of the cestui que trust shall, notwithstanding, be liable for the support and maintenance of his wife and minor children.

In Section 21, it is provided that the marriage of a testatrix shall operate to revoke her will only pro tanto and not absolutely, thus rendering the law uniform with that regulating the subject in the case of men.

In Section 22, corresponding to Section 23 of the Intestate Act, it is provided that no murderer shall be entitled to take under the will of the person whom he has killed.

In Section 23, the rights of a surviving husband and wife, electing to take against the will of the deceased spouse, are made uniform, as has already been indicated in the Preliminary Note to the Intestate Act; and the procedure relative to such election has been revised and defined with greater particularity.

Fiduciaries Act.

In this voluminous Act, the Commissioners have endeavored to arrange in one connected and systematic statute the law relating to the administration and distribution of the estates of decedents and of minors, and of trust estates, and particularly the jurisdiction, powers and procedure of the orphans' court relative to fiduciaries.

The intricacy of the subject is greater than anyone will readily believe who has not taken the trouble to examine it himself; and the labors of the Commissioners have been principally directed to the revision and consolidation of existing statutes and the repeal of

those that have become obsolete, rather than to the introduction of novel legislation. The changes recommended are for the most part designed to simplify and harmonize the procedure, which, in many instances, has become complicated by the passage of numerous statutes relating to specific matters of detail.

In Section 6, the Commissioners have revised the law relative to the estates of persons presumed to be dead on account of absence for seven years or more from their last domicile, a subject that has become very complicated by the numerous statutes which have been adopted in the past thirty years, and stands in great need of revision.

In Section 11, a method of compelling the filing of an inventory has been provided, and the fees of appraisers of decedents' estates have been regulated.

In Section 12, the widow's and children's exemption has been increased from $300 to $500, and the whole procedure regulated.

In Section 14, the rents of real estate accruing after the death of the owner have been made assets for the payment of his debts, when the personal estate is insufficient, and the procedure has been regulated.

In Section 15, the lien of decedents' debts has been shortened from two years to one year unless continued by proper proceedings, and the law as to judgments against decedents and their representatives has been revised.

Section 16 contains the statute law relative to sales and mortgages of real estate for the payment of debts. Very little change is made, but the phraseology has been altered and the provisions of the law re-arranged in more symmetrical order. Sales for payment of debts are now governed by several Acts of Assembly, some of the provisions of which are obsolete or inappropriate to present conditions. The procedure is regulated and the law as to confirmation of sales and the discharge of liens is particularly provided for.

In Section 18, the procedure in cases of contracts of decedents for the sale or purchase of real estate is more clearly regulated.

In Section 21, the law on the subject of interest on legacies is defined, particularly in reference to interest on legacies bequeathed in trust.

In Section 22, the Commissioners recommend a general rule upon the subject of apportionment of all periodical payments directed by will.

In Section 23, a change is recommended where there is a bequest of personal property or the proceeds of real estate for life and the life tenant does not enter security, in consequence of which a trustee is appointed. Such trustee, according to the revised act, undertakes only the usual responsibility of a trustee and is not to be considered as an insurer of the fund.

In Section 24, the jurisdiction of the orphans' court for the collection or enforcement of all legacies is made exclusive.

In Section 31, the power of testamentary trustees and guardians to lease real estate is extended and regulated.

In Section 32, elections by fiduciaries in behalf of their wards or cestuis que trust are provided for.

In Section 40, the orphans' court is empowered to authorize fiduciaries to settle or compromise litigation or disputes.

In Section 41, the power of fiduciaries to invest trust funds is extended.

In Section 42, more extensive powers are given to fiduciaries to incorporate or join in the incorporation of their decedents' business.

In Section 46 and other sections, the term for the settlement of a decedent's estate is shortened to six months instead of one year from the date of the grant of letters testamentary or of administration; and in the same section power is expressly given to the orphans' court to have examined the assets of estates in the hands of fiduciaries. The Commissioners have also provided for express notice of the filing of accounts to be given to all persons who claim to be interested.

In this section the law is made more specific as to the place where trustees' accounts should be filed; and the jurisdiction over testamentary trustees is made exclusive in the orphans' court.

In Section 49, more specific provisions are made as to distribution of estates.

In Section 53, the law as to the removal of fiduciaries is codified and revised, and summary power is given to the court in cases that seem to require it.

In Section 58, the powers of foreign fiduciaries are revised.

In Section 59, the law on the subject of the appointment of guardians is recast and codified.

In Section 60, the law on the subject of trustees durante absentia is revised in connection with the law as to the estates of presumed decedents.

Partition Act.

None of the subjects considered by the Commissioners have needed revision more than that of partition. The Acts of Assembly relating to this are numerous and complicated, and the Commissioners have experienced no little difficulty in their revision.

In Sections 2 and 3 of the Act as reported, express provision is made for a citation and notice to the parties interested before an inquest is awarded.

In Section 5, and in other sections of the act, more liberal provision is made for the service of citations or notices to parties resident outside of the commonwealth.

In Section 6, it is provided that the sheriff's inquisition shall consist of three men, corresponding with the number of commissioners.

In Section 7, the fees of commissioners and jurors are regulated.

In Section 13, it is provided that the allotment of purparts among the parties entitled shall be in accordance with seniority of age, in order to establish a uniform method in all cases.

In Section 43, an appeal is authorized from the decree of the court awarding an inquest, which under the present law is held to be interlocutory only.

Revised Price Act.

The Act of April 18, 1853, P. L. 503, commonly called the Price Act, from the name of its draftsman, has been extremely beneficial in its results and no fundamental changes have been considered necessary. It has, however, been amended by numerous statutes, and the Commissioners have endeavored in this revision to arrange its provisions in more symmetrical order and to consolidate in it the changes that have been made from time to time. The notes that have been annexed to the several sections in the revised act as now reported sufficiently indicate the changes that have been made in phraseology and those that are due to amendments.

Register of Wills Act.

In Section 5, the power of the Register to revoke letters of administration is stated, in accordance with the existing law.

In Section 8, an additional remedy is provided where any person having in his possession or under his control a testamentary paper conceals or withholds the same.

In Section 9, the Register is given additional power to subpoena witnesses.

In Section 16, the probate of a will or the refusal to probate it by a Register is made conclusive unless an appeal be taken within two years instead of three as the present law provides, and the remedy is expressly limited to an appeal from the register's decree.

In Section 18, provision is made for the removal of contested will cases from the Register's office to the orphans' court, in order to avoid the delays that sometimes occur under the present practice.

In Section 21 (*a*), it is provided that appeals from all the judicial acts of the Register must be taken within two years, and that the period may be limited to six months in case of those parties who have actual notice by citation.

Orphans' Court Act.

In revising the statutes relative to the orphans' court the Commissioners have not found it necessary or considered it advisable to recommend any changes of serious importance in its jurisdiction or procedure.

In Section 18 (*a*), 3 and 5, the writ of *fi. fa.* issued out of the orphans' court has been limited to personal property; and in Section 18 (*e*), provision has been made for filing in the court of common pleas transcripts of orders of the orphans' court for payment of money by others than fiduciaries, and for executions thereon against real property.

In Section 20 (*b*) and (*d*), the powers of the Court in connection with the taking and perpetuation of testimony are revised and enlarged.

In Section 20 (*e*) 1, the Commissioners have inserted a provision which is understood to conform with the prevailing practice, according to which on appeals from the Register of Wills the proceedings shall be de novo unless by agreement the appeal be heard on the testimony taken before the Register; the court having the right, however, to require the production of witnesses.

In several sections the court is given enlarged powers with respect to the service of citations and notices to parties interested in estates, and to those amenable to the jurisdiction of the court, including attachments to enforce obedience to its orders.

In general, the method of giving notices to persons interested has been left to be fixed by general rules of court or special orders in particular cases, the Commissioners considering that fixed statutory regulations are often inappropriate.

INTESTATE ACT.

TABLE OF CONTENTS.

PAGE

SECTION 1. Surviving spouse and issue:
(*a*) Surviving spouse and one child or descendants of one child 17
(*b*) Surviving spouse and more than one child, or descendants of more than one child 19

SECTION 2. Surviving spouse and no issue, but collateral heirs:
(*a*) Allowance of five thousand dollars, and one-half of remaining estate 19
(*b*) Appraisement and appraisers 20
(*c*) Confirmation of appraisement 21
(*d*) Allowance out of real estate valued at more than five thousand dollars 22
(*e*) Title to such real estate 22
(*f*) Rents, income, interest and dividends of property set apart 23
(*g*) Real estate in another county 23
(*h*) Certified copy of decree to be recorded and registered .. 25

SECTION 3. Widow's share in lieu of dower; share in lands aliened by husband and in estate in remainder 25

SECTION 4. Surviving husband's share in lieu of curtesy; share in estate in remainder 26

SECTION 5. Husband's right barred by refusal to provide for wife, or by desertion 26

SECTION 6. Widow's right barred by desertion 26

SECTION 7. Issue:
(*a*) Children 27
(*b*) Grandchildren 28
(*c*) Descendants in same degree of consanguinity 28
(*d*) Descendants in different degrees of consanguinity:
1. Shares of children 29
2. Shares of grandchildren 29
3. Issue taking by representation 29

SECTION 8. Parents 29

SECTION 9. Collateral heirs:
(*a*) Brothers and sisters 31
(*b*) Nephews and nieces 33
(*c*) Children of deceased brothers or sisters, taking by representation 33
(*d*) Descendants of brothers or sisters 33

PAGE

SECTION 10. Next of kin 34

SECTION 11. Limits of representation 34

SECTION 12. Grandparents and issue of deceased grandparents:
(a) Children of deceased grandparent 35
(b) Grandchildren of deceased grandparent 35
(c) Descendants of deceased grandparent in same degree of consanguinity 35
(d) Descendants of deceased grandparent in different degrees of consanguinity:
1. Children of deceased grandparent 36
2. Grandchildren of deceased grandparent 36
3. Issue taking by representation 36

SECTION 13. Rule as to blood of first purchaser abrogated 36

SECTION 14. Foregoing provisions apply only to legitimates 37

SECTION 15. Illegitimates:
(a) Inheritance as between mother, grandparents and child. 38
(b) Inheritance as between children, legitimate and illegitimate 39
(c) Legitimation as to mother but not as to father 39
(d) Legitimation by marriage of parents 40

SECTION 16. Adopted children:
(a) Inheritance as between adopted person and adopting parents 40
(b) Inheritance as between adopted person and adoptive relatives; natural kindred of adopted person excluded. 41

SECTION 17. Surviving spouse and no known heirs or kindred:
(a) Rights of surviving spouse 42
(b) Procedure 43

SECTION 18. Estates passing to persons entitled under the act 45

SECTION 19. Persons in same degree of consanguinity take equally .. 45

SECTION 20. Posthumous children 46

SECTION 21. Limitation of claims 46

SECTION 22. Advancements 46

SECTION 23. Person adjudged guilty of murder not to inherit from murdered person 47

SECTION 24. Escheat 48

SECTION 25. Act not to apply to personal estate of intestate dying domiciled outside the commonwealth 48

SECTION 26. Short title section 48

SECTION 27. When act shall go into operation 48

SECTION 28. Repealer 49

AN ACT

Relating to the descent and distribution of the real and personal property of persons dying intestate, and to provide for the recording and registering of the decrees of the orphans' court in connection therewith and the fees therefor.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That the real and personal estate of a decedent, whether male or female, remaining after payment of all just debts and legal charges, which shall not have been sold, or disposed of by will, or otherwise limited by marriage settlement, shall be divided and enjoyed as follows: namely,—

(*a*) Where such intestate shall leave a spouse surviving and one child only, or shall leave a spouse surviving and no children but shall leave descendants of one deceased child, the spouse shall be entitled to one-half part of the real and personal estate.

NOTE.—The introductory paragraph is copied from Section 1 of the Act of April 8, 1833, P. L. 315, 2 Purd. 1994, which was amended by the Act of April 1, 1909, P. L. 87, 5 Purd. 6476. Clause (*a*) is clause 1 of the same section, amended so as to make the rights of husband and wife the same and to eliminate the distinction between real and personal property in this regard, and to give the surviving spouse one-half of the estate under the circumstances described.

Section 1 of the Act of 1833 was derived from Sections 3 and 4 of the Act of April 19, 1794, 3 Sm. L. 143. The earlier acts provided, in substance, as follows: Act of 1683 (110th Law): "That the estate of an intestate shall go to his wife, his child, or children." Act of 1684 (172nd Law): "One-third of the personal estate shall go to the wife; and one-third of the lands and tenements during her natural life; * * * and in case the intestate leaves no child, then half the personal estate to the widow, and the moiety of the real estate during her natural life." Act of 1693: "One-third to the wife, the residue

among his children * * *; and if there be no children nor legal representatives of them, one moiety shall be allotted to the wife. * * * Provided, That where testators, or intestates personal estates are sufficient to pay all debts," and so forth, "then the real estate to be distributed in manner following, * * * one-third of all intestates' lands to the wife for life." Act of 1705 (3 Sm. L. 156 n.): "One-third part of the said surplusage to the wife of the intestate. * * * And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate."

Section 8 of the Act of 1705 provided: "That the surplusage or remaining part of the intestate's lands, tenements and hereditaments * * * shall be divided between the intestate's widow and children, or the survivors of them, who shall equally inherit and make partition, as tenants in common may or can do. But if the intestate leaves a widow and no child, then such widow or relict shall inherit one moiety or half part of the said lands and tenements."

Section 10 of the Act of 1705 provided: "That nothing in this act contained shall give any widow a right or claim to any part of such lands or tenements, for her dower or thirds, as shall yield yearly rents, or profits, whereof her husband died seised, for any longer time than the term of her natural life; which dower she shall hold as tenants in dower do in England."

Section 2 of the Act of March 23, 1764 (3 Sm. L. 159 n.) provided: "That the shares and purparts of intestates real estates which by the act for settling intestates estates aforesaid are given to widows, shall be construed and understood to be estates for their natural lives respectively and not otherwise."

Section 5 of the Act of April 4, 1797 (3 Sm. L. 296) provided: "That where any woman shall hereafter die intestate" leaving a husband, "he shall take the whole personal estate, and the real estate shall descend and go in the same manner as is directed in the case of men dying intestate, saving to the husband his right as tenant, by the curtesy."

In this section, the Commissioners have introduced a change which they consider a much needed improvement. The Act of 1833 provides for two cases: first, where there is no issue, and second, where there is issue.

This clause provides for the case where there is issue one child, or the descendants of one child only; in which case the surviving spouse will take not one-third, but one-half of the estate. It seems unjust where a man dies leaving a widow and one child, often a minor, that the single child should receive twice as much as its mother, and many cases of hardship have been observed in practice. In Rowan's Estate, 132 Pa. 299, an adopted child was thus held entitled to two-thirds of the estate as against the widow.

In this section and throughout the act the Commissioners have used the words, "surviving spouse," in place of "widow or surviving husband," and the like, believing that the use of one word is preferable when can be no mistake as to the meaning, and where the interests of widow and husband are made the same, as it is now suggested they should be.

(*b*) Where such intestate shall leave a spouse surviving and more than one child, or one child and the descendants of a deceased child or children, or the descendants of more than one deceased child, the surviving spouse shall be entitled to one-third part of the real and personal estate.

NOTE.—This is a new clause, further amending clause 1 of Section 1, of the Act of 1833, along the same lines.

SECTION 2 (*a*) Where such intestate shall leave a spouse surviving and other kindred, but no issue, the surviving spouse shall be entitled to the real or personal estate, or both, to the aggregate value of five thousand dollars, in addition, in the case of a widow, to the widow's exemption as allowed by law; and if such estate shall exceed in value the sum of five thousand dollars, the surviving spouse shall be entitled to the sum of five thousand dollars absolutely, to be chosen by him or her from real or personal estate, or both, and in addition thereto, shall be entitled to one-half part of the remaining real and personal estate: *Provided*, That the provisions of this clause shall apply only to cases of actual intestacy of husband or wife, entire or partial, and not to

cases where the surviving spouse shall elect to take against the will of the deceased spouse.

NOTE.—This is clause II of Section 1 of the Act of 1833, as amended by the Acts of April 1, 1909, P. L. 87, 5 Purd. 6476, and July 21, 1913, P. L. 875, 5 Purd. 6478, further amended so as to apply expressly to husband as well as wife, so as to be limited to cases of actual intestacy, and so as to make the estate of the surviving spouse absolute in real as well as personal property.

The words "collateral heirs" are omitted in the second line, as they exclude parents and grandparents.

In accordance with their view that the interests of the surviving husband and wife should be the same, the Commissioners have made the provisions of the Act of April 1, 1909, apply equally to both cases. The special allowance of $5000 where there is no issue, conferred upon the widow by this act, appears to have been favorably considered during the time it has been in operation, and no change in the amount is suggested. The Act of April 1, 1909, was most probably not intended by the Legislature to apply to the case of a husband who should elect to take against the will of his wife (there being no issue), but this result followed logically from a consideration and comparison of the Acts of April 8, 1833, P. L. 315, April 11, 1848, Section 11, P. L. 536, and May 4, 1855, Section 1, P. L. 430, as shown in Buckland's Estate, 239 Pa. 608; Moore's Estate, 50 Super. Ct. 76.

A result of the Act of 1909 in connection with prior legislation is that a married person having no issue whose estate amounts to $5000 or less cannot make any testamentary disposition of his or her estate. The Commissioners recommend in this section that the special allowance of 1909 shall be made only in cases of actual intestacy, and not where the surviving spouse elects to take against the will of the deceased spouse.

(*b*) The appraisement and setting apart of the said five thousand dollars in value of property shall be made by two appraisers, who shall be appointed by the orphans' court having jurisdiction of the accounts of the personal representatives of such intestate, and shall be sworn or

affirmed to appraise the property which the surviving spouse shall choose under the provisions of this act. Each of such appraisers shall receive, as compensation for each day or fraction thereof necessarily employed in the performance of their duties, the sum of two dollars and fifty cents, and such additional amount as may be allowed by said court.

NOTE.—This is founded on the Act of April 1, 1909, P. L. 87, 5 Purd. 6476, as amended by the Act of July 21, 1913, P. L. 875, 5 Purd. 6478, further amended so as to provide for the appointment by the orphans' court of two appraisers, for the swearing or affirming of such appraisers, and for their compensation.

The Commissioners have concluded that the appraisement of the property chosen by the surviving spouse to be awarded under this act should be made by appraisers appointed by the court rather than by the appraisers of the "other personal estate," as is now the law. In many cases, where real estate is selected, the regular appraisers are not necessarily qualified to value it, and as the rights of the heirs are involved, it seems best that the appraisers should be formally appointed.

In this and other clauses of the act relating to this special allowance, the Commissioners have avoided any reference to the procedure under prior Acts of Assembly relating to the widow's exemption, which introduced a needless complication in the Act of April 1, 1909.

(*c*) Upon due proof of compliance with such requirements as to notice, by advertisement or otherwise, as may be prescribed by the orphans' court by general rule or otherwise, such court may confirm such appraisement and set apart such personal or real estate, or both, to the surviving spouse, subject to claims of creditors of the decedent and to the lien of debts of the decedent.

NOTE.—This is a new clause, introduced in order to give the orphans' court express power to set apart property claimed by the surviving spouse, in advance of the distribution of the estate.

(*d*) Whenever the surviving spouse of any intestate shall claim the said five thousand dollars in value, or any part thereof, under the provisions of this act, out of real estate left by said intestate, and the real estate appraised cannot be divided so as to set apart the amount so claimed in value without prejudice to or spoiling the whole or any parcel of said real estate, and the appraisers shall appraise and value the same at any sum exceeding the amount so claimed, it shall be lawful for the orphans' court, to which such application shall be made, to confirm such appraisement, and to set apart for the use of the surviving spouse such real estate, conditioned, however, that the said surviving spouse shall pay the amount of the valuation or appraisement in excess of the amount so claimed within one year from the date of confirmation of such valuation. If the said surviving spouse shall refuse to take the real estate at such appraisement, or shall fail to make payment as above provided, the court, on application of any person interested, shall direct the executor or administrator to sell the same, and the procedure in such case shall be the same as is provided by law in cases of sales of real estate for the payment of debts of a decedent.

NOTE.—This is Section 1 of the Act of July 21, 1913, P. L. 872, 5 Purd. 6478, altered in the following particulars:

The language is changed so as to apply to cases where the real estate in question consists of more than one parcel and no single parcel is worth five thousand dollars, but all of them are worth more than that amount.

The language is also changed so as to cover cases where part of the five thousand dollars is taken in personal property and the amount claimed out of real estate is therefore less than five thousand dollars. The same change is made in subsequent clauses.

The words, "or fails to make payment as above provided," are inserted in the last sentence, also changed so as to provide that the sale shall be made by the executor or administrator, and so as to prescribe the procedure.

(*e*) The real estate, if taken by the surviving spouse as aforesaid, shall vest in him or her and his or her heirs

or assigns upon his or her paying the surplus over and above the sum of five thousand dollars or such part thereof as may be claimed out of the real estate to the parties entitled thereto. Where the real estate is sold as provided in clause (*d*) of this section, the sum of five thousand dollars or such part thereof as may be claimed out of the real estate shall be paid out of the purchase money to the surviving spouse, and the balance, after payment of costs and expenses, shall be distributed to the heirs, or other persons legally entitled thereto.

NOTE.—This is Section 2 of the Act of July 21, 1913, P. L. 872, 5 Purd. 6478, omitting the words, "if the real estate should not be so taken at the appraisement," and substituting a reference to the preceding clause.

(*f*) In all cases where the appraisement of property, real or personal or both, is confirmed and the property set apart to the surviving spouse under the provisions of this section, said surviving spouse shall be entitled to receive for his or her own use the net rents, income, interest and dividends thereof from the date of the death of such intestate. Where the property set apart shall consist of real estate appraised at a sum in excess of five thousand dollars or such part thereof as may be claimed out of the real estate, and the surviving spouse shall fail to pay the excess over the amount so claimed as provided in clause (*d*) of this section, and the property shall thereupon be sold, there shall be deducted from the sum to be paid to said surviving spouse out of the proceeds of such sale a proportionate part of the rents and income of such real estate received by such surviving spouse.

NOTE.—This is a new clause, introduced to include the right to the income of the property set apart to the surviving spouse from the date of the death of the intestate.

(*g*) Whenever the surviving spouse of any intestate shall claim the said five thousand dollars in value, or any part thereof, under the provisions of this section, out of

real estate left by said intestate and lying in any county of this state other than the county wherein said intestate shall be domiciled at the time of his or her death, and the orphans' court having jurisdiction of the accounts of the personal representatives of said intestate shall be satisfied, upon petition filed, of the propriety of allowing such claim the court may make a decree authorizing such surviving spouse to file his or her petition in the orphans' court of the county wherein such real estate may lie, or, in a case where the real estate is divided by a county line, in the county where the mansion house may be situated, or, if there be no mansion house, in the county where the principal improvements may be, or, if there be no improvements, in either county, praying for the appointment of two appraisers.

Upon the filing of such petition, duly verified, the latter court shall appoint such appraisers, who shall be duly sworn or affirmed, and shall appraise said real estate, and shall be compensated as provided in clause (*b*) of this section; and proceedings shall thereupon be had in said court and subject to its supervision and control, in the same manner and with the same effect as is provided in clauses (*c*), (*d*), (*e*), and (*f*) of this section. In every such case a certified copy of the decree confirming such appraisement, or of such decree of sale and the confirmation thereof, as the case may be, shall forthwith be filed with the clerk of the orphans' court having jurisdiction of the accounts of the personal representatives of said intestate.

The court having jurisdiction of the accounts shall in all cases have exclusive jurisdiction of the distribution of the surplus paid by such surviving spouse, or of the proceeds of such sale, after the payment of costs and expenses, as the case may be.

NOTE.—This is a new clause, introduced to cover the case of lands lying in other counties. It is modeled to some extent upon Section 32 of the Act of March 29, 1832, P. L. 190, 1 Purd. 1118, relating to sales for the payment of debts.

It seems clear that the distribution of the estate, and the setting apart of the real estate chosen by the surviving spouse should be made under the control of the orphans' court of the county having jurisdiction of the accounts of the administrator or executor, and it seems equally clear that some record should be made of the decree in the county where the real estate is situated, and that the sale should be under the direction of the orphans' court of that county.

(*h*) In all cases where a decree shall be entered by any orphans' court confirming an appraisement of real estate and setting apart the same for the use of the surviving spouse, a certified copy of such decree shall be recorded in the office of the recorder of deeds of each county where such real estate shall lie, in the deed book, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the name of the surviving spouse, and shall be registered in the survey bureau, or with the proper authorities empowered to keep a register of real estate, if any there be, in said county; and the charges for recording and registering shall be the same as are provided by law for similar services, and shall be paid by said surviving spouse.

NOTE.—This is a new clause, introduced for the sake of convenience in connection with the title to real estate.

SECTION 3. The shares of the estate directed by this act to be allotted to the widow shall be in lieu and full satisfaction of her dower at common law so far as relates to lands of which the husband died seised; and her share in lands aliened by the husband in his lifetime without her joining in the conveyance shall be the same as her share in lands of which the husband died seised. The widow shall be entitled to the same share in an estate in remainder vested in interest in the husband during his lifetime, although the particular estate shall not terminate before the death of the husband.

NOTE.—This is Section 15 of the Act of April 8, 1833, P. L. 315, 2 Purd. 2002, altered so as to make the widow's share in lands aliened by the husband without her joinder the same as her share in lands of which he dies seised. The last sentence is added to correspond with the last sentence of Section 4 of this act.

Section 15 of the Act of 1833, was derived from Section 13 of the Act of April 19, 1794, 3 Sm. L. 143.

SECTION 4. The shares of the estate directed by this act to be allotted to the surviving husband shall be in lieu and full satisfaction of his curtesy at common law. The surviving husband shall be entitled to the same share in an estate in remainder vested in interest in the wife during her lifetime as in property of which she dies seised, although the particular estate shall not terminate before the death of the wife.

NOTE.—This is a new section introduced in accordance with the plan to make the rights of the husband and wife the same. The last sentence is added to make the husband's rights the same as those of the wife in estates in remainder, the existing law making a distinction in this respect. See Hitner *vs.* Ege, 23 Pa. 305.

SECTION 5. No husband who shall have, for one year or upwards previous to the death of his wife, wilfully neglected or refused to provide for his wife, or shall have, for that period or upwards, wilfully and maliciously deserted her, shall have the right to claim any title or interest in her real or personal estate after her decease, under the provisions of this act.

NOTE.—This is part of Section 5 of the Act of May 4, 1855, P. L. 430, 3 Purd. 2461, amended by the Act of May 3, 1915, P. L. 234, 6 Purd. 6588, omitting the words, "as aforesaid," before the words, "for one year or upwards."

SECTION 6. No wife who shall have, for one year or upwards, previous to the death of her husband, wilfully and maliciously deserted her husband, shall have the right to claim any title or interest in his real or per-

sonal estate after his decease, under the provisions of this act.

NOTE.—This is the part added to Section 5 of the Act of 1855, by the amendment of 1915, with the substitution of the words "under this act," for "under the intestate laws of this Commonwealth."

SECTION 7. The real and personal estate of such intestate, not hereinbefore given to the surviving spouse, if any there be, shall descend to and be distributed among his or her issue, according to the following rules and order of succession, namely,—

(*a*) If such intestate shall leave children, but no other descendant, being the issue of a deceased child, the estate shall descend to and be distributed among such children.

NOTE.—This is clause I of Section 2 of the Act of 1833, 2 Purd. 1996, modified in language because of the abolition of life estates to the widow and surviving husband.

Clauses (*b*), (*c*) and (*d*) of Section 7 are copied from clauses II, III and IV of Section 2 of the Act of 1833.

Section 2 of the Act of 1833 was derived from Sections 3 and 4 of the Act of April 19, 1794, 3 Sm. L. 143.

The earlier acts provided, in substance, as follows. Act of 1683 (110th Law): "That the estate of an intestate shall go to his wife, his child, or children." Act of 1684 (172nd Law): "The remainder (after the widow's share) shall go to the children, the eldest son having a double part or share." Act of 1693: "One-third to the wife, the residue among his children, and such as legally represent them (if any of them be dead) the eldest son having a double part or share," and, as to real estate, "the residue to be allotted and distributed as the surplusage of personal estate is limited and directed." Act of 1705 (3 Sm. L. 156 n.): "All the residue, by equal portions, to and amongst the children of such person dying intestate, allowing the eldest son two shares; and to such persons as legally represent such children, in case any of the said children be then dead * * * to whom such distribution is to be made." Section 8 of the Act of 1705 provided that "the surplusage or remaining part of the intestate's lands, tenements and hereditaments, not sold, or ordered to be sold, by virtue of this act, and not otherwise limited

by marriage settlement, shall be divided between the intestate's widow and children, or the survivors of them, who shall equally inherit and make partition, as tenants in common may or can do. * * * But if the intestate leaves no widow nor child living at the time of his death, or if the children all die in their minority, without issue, then the said lands and tenements shall descend and come to the intestate's heir at law, according to the course aforesaid. But if any of the intestate's children, dying before the intestate, shall leave lawful issue, such issue shall equally inherit the intestate's lands and tenements, with their uncles or aunts, and make partition as aforesaid." Act of March 23, 1764 (3 Sm. L. 159 n.): "If after the death of any father and mother any of their children hath died, or, at any time after the passing of this act shall die intestate, in their minority, unmarried, and without issue, but not otherwise, the lands, tenements, hereditaments and estates, real and personal, of every such intestate, shall be equally divided amongst the surviving children, and the representatives of any child or children then dead, those representatives taking only such part or share, as should have passed to the child or children they represent respectively in severalty forever. But if any child, either of age or in his or her minority, having or being entitled to any personal estate under such father, shall, after the passing of this act, die intestate, unmarried, and without issue, during the life of his or her mother, all such personal estate shall be equally divided between such mother of the deceased, and his or her brothers and sisters, and their legal representatives, in case any such brother or sister be then dead, they the said representatives only taking the share that should have passed to his, her or their parents, had he or she been living."

(*b*) If such intestate shall leave grandchildren but no child or other descendant, being the issue of a deceased grandchild, the estate shall descend to and be distributed among such grandchildren.

(*c*) If such intestate shall leave descendants in other degrees of consanguinity, however remote from him, and all in the same degree of consanguinity to him, the estate shall descend to and be distributed among such descendants.

(*d*) If such intestate shall leave descendants in different degrees of consanguinity to him, the more remote of them being the issue of a deceased child, grandchild or other descendant, the estate shall descend to and be distributed among them as follows, namely,—

1. Each of the children of such intestate shall receive such share as such child would have received if all the children of the intestate who shall then be dead, leaving issue, had been living at the death of such intestate.

2. Each of the grandchildren, if there shall be no children, in like manner, shall receive such share as he or she would have received if all the other grandchildren who shall then be dead, leaving issue, had been living at the death of the intestate, and so in like manner, to the remotest degree.

3. In every such case, the issue of such deceased child, grandchild or other descendant, shall take, by representation of their parents respectively, such shares only as would have descended to such parents, if they had been living at the death of the intestate.

SECTION 8. In default of issue as aforesaid, the real and personal estate of such intestate, not hereinbefore given to the surviving spouse, if any there be, shall go to and be vested in the father and mother of such intestate, or if either the father or mother be dead at the time of the death of the intestate, the parent surviving shall take such real and personal estate.

NOTE.—This is derived from Sections 3 and 5 of the Act of 1833, 2 Purd. 1997–8, altered so as to abolish the distinction between real and personal estates and give both to the parents absolutely, and modified in language because of the abolition of life estates to the widow and surviving husband.

Section 3 of the Act of 1833 was derived from Sections 5 and 7 of the Act of April 19, 1794, 3 Sm. L. 143. Those sections provided that where a person died without widow or lawful issue the father should take the real estate for life and the personal estate absolutely, unless such estate came to the intestate from the part of his mother, in which case such estate should descend as if the intestate had sur-

vived his father. Section 7 of the Act of 1794 provided that where an intestate left neither widow, lawful issue nor father, but his mother survived, she should take the real and personal estate in the same way.

Section 5 of the Act of 1833 was derived from Section 6 of the Act of 1794 and Section 5 of the Act of April 4, 1797, 3 Sm. L. 296. Section 6 of the Act of 1794 provided that if the intestate left neither widow nor issue but left a father and brothers and sisters, the brothers and sisters should take the real estate after the death of the father, with provisions for representation by the issue of deceased brothers or sisters; but that if the intestate left no brothers or sisters nor their representatives, the estate should go to the father in fee simple, unless it had descended from the part of the mother.

Section 5 of the Act of 1797 provided that the estate of a woman dying intestate without leaving a husband should descend and be divided in the same manner as the Act of 1794 provided in the case of a man dying intestate. This section further provided that if any intestate died leaving neither widow, issue, father, brother, sister, or their representatives, then the estate should be vested in fee simple in the mother, unless it had descended from the part of the father.

The Act of 1683 (110th Law) provided that where an intestate left no wife, child, brother or sister or children of brothers or sisters, one-half of the estate should go to the parents and the other half to the next of kin.

The Act of 1684 (172nd Law) provided that in such case one-half should go to the parents and one-half to the governor.

The Act of 1693 provided that in such case the whole estate should go to the parents.

The Act of 1705 (3 Sm. L. 156 n.) provided that in the absence of issue one-half of the estate should go to the wife and the residue "be distributed equally to every of the next kindred of the intestate, who are in equal degree, and those who legally represent them," and if there was no wife then the entire estate should be distributed to such kindred.

Section 9. In default of issue, father and mother, the real and personal estate of such intestate, not hereinbefore given to the surviving spouse, if any there be, shall descend to and be distributed among the collateral heirs and kindred of such intestate, without distinction be-

tween those of the whole and those of the half blood, according to the following rules and order of succession, namely,—

(*a*) If such intestate shall leave brothers and sisters, or either, and no nephew or niece, or child of a deceased nephew or niece, being the issue of a deceased brother or sister, the real and personal estate shall descend to and be distributed among such brothers and sisters.

NOTE.—Clauses (*a*) to (*c*) of this section are derived from clauses I, II and IV of Section 4 of the Act of 1833, 2 Purd. 1998. The introductory clause is altered so as to abolish the distinction between the whole and the half blood in the inheritance of real estate and to make the rule as to real estate the same as that provided by clause V of that section in the case of personal estate. Clause V therefore becomes unnecessary and is omitted. The language of the introductory paragraph is further modified because of the abolition of life estates to the widow and surviving husband.

Changes have also been made to cover the principle of representation by grandchildren of deceased brothers or sisters (see Section 11), and clause III of Section 4 of the Act of 1833 is replaced by the present clause (*d*); but no change is intended in the existing law as stated in Krout's Appeal, 60 Pa. 380.

Section 4 of the Act of 1833 was derived from Sections 6 and 8 of the Act of 1794, and Sections 5 and 7 of the Act of 1797.

Section 6 of the Act of 1794 provided that real estate should, after the death of the father, descend to brothers and sisters, with provision for representation by the issue of deceased brothers or sisters, the principle of representation not being limited to the children of brothers and sisters. Section 8 of the Act of 1794 contained similar provisions for the case where the mother of the intestate took a life estate.

Section 11 of the Act of 1794 provided for inheritance by the half blood in the absence of parents or brothers or sisters of the whole blood or their issue, but with a limitation to those of the blood of the first purchaser.

Section 5 of the Act of 1797 provided for the inheritance by brothers and sisters in the absence of widow, issue or parents, with provision for representation by the issue of

deceased brothers or sisters. Section 7 of that act provided for inheritance of the real estate by brothers and sisters of the whole blood to the exclusion of those of the half blood, but permitted the half blood to share equally in the personal estate, and provided for the inheritance of both real and personal property by brothers and sisters of the half blood in the absence of those of the whole blood or their issue, with a limitation to those of the blood of the first purchaser.

The Act of 1683 (110th Law) provided for inheritance by brothers and sisters or the children of brothers or sisters in the absence of wife or child. No distinction was made as to the half blood.

The Act of 1684 (172nd Law) was similar.

The Act of 1705 (3 Sm. L. 156 n.) provided that in the absence of issue the widow should take half the estate and the residue should go equally "to every of the next kindred of the intestate, who are in equal degree, and those who legally represent them: Provided, That there be no representatives admitted amongst collaterals, after brothers and sisters children." In case there was neither widow nor child, then the next kindred took the whole estate in the same manner.

The distinction at present existing in our laws concerning the inheritance of real estate between heirs of the whole blood and those of the half blood is now admitted by all legal critics to have been unsatisfactory even in the times when it originated. Even Blackstone, Book 2, ch. 14, after stating that it is almost peculiar to the common law, and attempting to justify or rather explain it, admits that it is certainly a very fine-spun and subtle nicety. Sir Henry Sumner Maine, in his Ancient Law, expresses the opinion that nothing in the literature of the history of the law is more curious than Blackstone's remarks upon this rule of feudal succession. The rule had been entirely or partially abolished in very many of the United States even in Chancellor Kent's time (4 Commentaries, 404); and has been abolished in others since he wrote. In Pennsylvania, no distinction is made by the present law between the whole and half blood in the distribution of personal property, and the present Commissioners are, as has been stated, strongly of opinion that real and personal property should descend and be distributed according to the same uniform plan.

(*b*) If such intestate shall leave neither brother nor sister, and no child of any deceased nephew or niece, being the issue of a deceased brother or sister, but nephews or nieces, being the children of such deceased brother or sister, the real and personal estate shall descend to and be distributed among such nephews and nieces.

(*c*) If such intestate shall leave neither brother nor sister, nor any nephew or niece, being the child of such deceased brother or sister, but children of deceased nephews or nieces, the real and personal estate shall descend to and be distributed among such children of deceased nephews or nieces.

(*d*) If such intestate shall leave brothers or sisters and nephews or nieces, being children of a deceased brother or sister, and children of deceased nephews or nieces, being issue of deceased brothers and sisters, or shall leave members of any two of these three classes, the real and personal estate shall descend to and be distributed among such brothers and sisters, nephews and nieces, and children of deceased nephews and nieces, as follows; namely:

Each brother and sister shall receive such share as he or she would have received if all the brothers and sisters who died before the intestate leaving children or children of deceased children surviving the intestate had been living at the death of the intestate.

Each nephew and niece, if the intestate shall leave any brother or sister, shall receive an equal portion of the share which his or her parent would have taken if then living, which portion shall be what he or she would have taken if all the children of his or her parent who died before the intestate leaving children surviving the intestate had been living at the death of the intestate; but if such intestate shall leave neither brother nor sister, the nephews and nieces shall take per capita.

Each child of a deceased nephew or niece, whether the intestate shall leave members of one or both of the other classes, shall receive an equal portion of the

share which his or her parent would have received if living at the death of the intestate.

SECTION 10. In default of all persons hereinbefore described, the real and personal estate of the intestate shall descend to and be distributed among the grandparents or descendants of deceased grandparents of such intestate, and in default thereof to and among the next of kin to such intestate.

NOTE.—This is Section 7 of the Act of 1833, 2 Purd. 1999, which was derived from Section 12 of the Act of 1794. The latter section, however, provided for representation by the issue of kindred without limitation.

The explanatory words at the end, declaratory of the existing law, have been added for completeness.

The Acts of 1683, 1684, 1693 and 1705 provided for inheritance by the next of kin, the Act of 1705 limiting the principle of representation, as already stated, to brothers' and sisters' children.

This and Sections 11 and 12 make no change in the existing law, inasmuch as no suggestions have come to the Commissioners for their modification, and none seem desirable.

SECTION 11. The grandchildren of brothers and sisters and the children of uncles and aunts shall be entitled to take by representation the shares of real and personal estate which their parents would have taken if living; but, except as hereinafter provided, there shall be no representation admitted among collaterals after the grandchildren of brothers and sisters and the children of uncles and aunts.

NOTE.—This takes the place of Section 8 of the Act of 1833, 2 Purd. 1999, and Section 2 of the Act of April 27, 1855, P. L. 368, 2 Purd. 1999, with the addition, in the last line, of the words "grandchildren of brothers and sisters and the."

The Commissioners who drafted the Act of 1833 remarked that in Section 8 they restored to the law a provision which was included in the Act of 1705 and continued in force until the Act of 1794, from which it was omitted, probably through inadvertence. See notes to Sections 9 and 10.

Section 2 of the Act of 1855 extended the principle of representation so as to include the grandchildren of deceased brothers and sisters and the children of deceased uncles and aunts. There seems to be no reason for altering the law as it now stands.

SECTION 12. If the next of kin of an intestate, entitled to take under the provisions of this act, shall be one or more than one grandparent of such intestate, and there shall be living, at the time of the decease of such intestate, children or other descendants of any deceased grandparent, then the children or other descendants of any such deceased grandparent shall represent the grandparent so deceased, and shall take the share of real or personal estate to which such deceased grandparent would be entitled if living.

The issue of any such deceased grandparent shall take according to the following rules of succession, namely,—

(*a*) If there be only children of such deceased grandparent, the share of such deceased grandparent shall descend to and be distributed among such children.

NOTE.—The clauses of this section are copied from clauses I to IV of Section 1 of the Act of May 25, 1887, P. L. 261, 2 Purd. 1999.

It is stated in Whitaker's Estate, 175 Pa. 139, 142, that the Act of 1887 was passed to meet the decision in McDowell *vs.* Addams, 45 Pa. 430, where it was held that a living grandparent took to the exclusion of the descendants of a deceased one.

The only change made from the Act of 1887 is to add, in clause (*b*), the words "being children of a deceased grandchild" after "no other descendants." This is the evident meaning of the clause, and the words are inserted for the sake of clearness.

(*b*) If there be grandchildren of such deceased grandparent and no other descendants, being children of a deceased grandchild, and no child, the share of such deceased grandparent shall descend to and be distributed among such grandchildren.

(*c*) If there be descendants of such deceased grandparent in any other degree however remote from him,

and all in the same degree of consanguinity to him, the share of such deceased grandparent shall descend to and be distributed among such descendants.

(d) If there be descendants of such deceased grandparent in different degrees of consanguinity to him, the more remote of them being the issue of a deceased child, grandchild or other descendant, the share of such deceased grandparent shall descend to and be distributed among them as follows, namely,—

1. Each of the children of such deceased grandparent shall receive such share as such child would have received if all the children of such deceased grandparent, who shall then be dead leaving issue, had been living at the death of the intestate.

2. Each of the grandchildren, if there shall be no children of such deceased grandparent, in like manner shall receive such share as he or she would have received if all the other grandchildren, who shall then be dead, leaving issue, had been living at the death of the intestate, and so in like manner to the remotest degree.

3. In every such case, the issue of such deceased child, grandchild or other descendant of such deceased grandparent shall take, by representation of their parents respectively, such share only as would have descended to such parents, if they had been living at the death of the intestate.

NOTE.—This provision of the Act of 1887 introduced the principle of unlimited representation, not in harmony with the Act of 1855 (Section 11, *supra*); but it has been in effect for thirty years and, so far as the Commissioners are advised, has proved satisfactory. Hence, they do not feel justified in recommending a change.

SECTION 13. In all cases where, under the provisions of this act, the real estate shall descend to and the personal estate shall be distributed among the next of kin of an intestate, the real as well as the personal estate shall pass to and be enjoyed by such next of kin,

without regard to the ancestor or other relation from whom such estate may have come, it being the true intent and meaning of this act that the rule excluding from the inheritance of real estate persons not of the blood of the ancestor or other relation from whom such real estate descended, or by whom it was given or devised to the intestate, be abrogated, and that the heir at common law shall not take, in any case, to the exclusion of other heirs and kindred standing in the same degree of consanguinity with him to the intestate.

NOTE.—This is Section 11 of the Act of 1833, 2 Purd. 2002, amended so as to apply to all cases and not merely to cases "not expressly provided for" by the act. It involves the repeal of Section 9 of the Act of 1833, 2 Purd. 2000–1, and of Section 2 of the Act of May 25, 1887, P. L. 261, 2 Purd. 2000, which re-enacted the provisions of Section 9 of the Act of 1833 in connection with the cases provided for by the Act of 1887, as to which see the last preceding note.

The Act of 1794, as already noted, expressly imposed the rule as to the blood of the first purchaser in certain cases, namely, those of inheritance by the father or mother or by the half blood; and the common law rule seems to have been applied generally before the Act of 1833 (see Bevan *vs.* Taylor, 7 S. & R. 397; overruling Walker *vs.* Smith, 3 Yeates 480). There is no reference to the rule in any of the earlier acts.

The common law rule as to inheritance from the blood of the first purchaser was infringed upon by the Act of 1833, but still exists in other cases where its effect is generally entirely arbitrary; and the Commissioners recommend its total abolition. This change is also in accordance with the general principle of this revision, that no distinction should be made in the intestate act between real and personal estates.

SECTION 14. Except as otherwise provided in Section 15, the foregoing provisions of this act relative to descent and distribution of real and personal estate among the heirs and next of kin of intestates shall be construed to mean such persons only as may have been born in lawful wedlock.

NOTE.—This is Section 17 of the Act of 1833, 2 Purd. 2003, except for the insertion of the words from "except" to "foregoing," and the substitution of "next of kin" for "descendants and collateral relations." The rights of illegitimates are treated in the next section; the sections after Section 15 apply to illegitimates as well as legitimates.

The Act of 1794 and the earlier acts contain no reference to illegitimates, but mention "children" and "lawful issue."

SECTION 15 (*a*) The mother of an illegitimate child, her heirs and next of kin, the maternal grandfather and grandmother of said illegitimate child, and said illegitimate child, its heirs and next of kin, shall have capacity to take or inherit from each other personal estate as next of kin, and real estate as heirs, under the foregoing provisions of this act, in the same manner and to the same extent as if said child or children had been born in lawful wedlock.

NOTE.—This is Section 2 of the Act of July 10, 1901, P. L. 639, 2 Purd. 2005–6, changing "legal representatives" to "next of kin" in two places, substituting "the foregoing provisions of this act" for "the intestate laws of this Commonwealth," omitting, in lines 3 and 4, the words "or children" before "its," and "or their" after "its," and in line 6, "in fee simple, or otherwise," after "heirs," and adding "grandfather."

The Act of April 27, 1855, P. L. 368, Section 3, gave an illegitimate child and its mother capacity to inherit from one another.

The Act of June 5, 1883, P. L. 88, Section 1, gave illegitimate children of the same mother capacity to inherit personal property from one another.

Section 3 of the Act of April 27, 1855, *supra*, was amended by the Act of June 14, 1897, P. L. 142, Section 1, 2 Purd. 2004 5, so as to enable illegitimate children and their issue and their mother and grandmother to take or inherit from each other personal and real estate, and as regards real or personal estate so taken and inherited, to transmit the same according to the intestate laws of the state.

The "grandmother" included in the Act of 1897, is, presumably, the maternal grandmother, although the act does not say so.

The Act of June 10, 1901, P. L. 551, Section 1, 2 Purd. 2005, provides that all children of the same mother,

whether legitimate or illegitimate dying without leaving children or others entitled to inherit under the existing laws, shall have capacity to inherit from each other, to the exclusion of the grandmother of said illegitimate child or children. This is covered by clause (*b*) of the present section of the new act.

The new draft does not include the provision of Section 1 of the Act of 1897, and of Section 1 of the Act of July 10, 1901, that "illegitimate children shall take and be known by the name of their mother," and the further provisions of the latter section are also omitted as not within the scope of an intestate act.

This will be covered by repealing Section 1 of the Act of 1897 but allowing Section 1 of the Act of July 10, 1901, 2 Purd. 2005, to stand, although the other sections of that act should be repealed since their substance is contained in the new act.

(*b*) Every illegitimate child shall be considered as a brother or sister to every other child of its mother, legitimate or illegitimate.

NOTE.—This is Section 3 of the Act of July 10, 1901, 2 Purd. 2006, altered by changing "each" to "every," inserting the words "a brother or sister," omitting the words "of the half blood," since the distinction between the whole and half blood is abolished by the new act, and omitting the remainder of the section, beginning "notwithstanding any repute or conviction." Neither the meaning nor the purpose of that part of the section is apparent.

(*c*) The intent of this section is to legitimate an illegitimate child only so far as is provided by clauses (*a*) and (*b*) hereof. This section is not intended to change the existing law with regard to the father of such a child, and his heirs and next of kin.

NOTE.—This is Section 4 of the Act of July 10, 1901, as amended by Section 1 of the Act of March 26, 1903, P. L. 70, 2 Purd. 2006, altered by omitting after "illegitimate child" the words, "or its heirs, as to its mother and her heirs," and inserting "only so far as is provided in clauses (*a*) and (*b*) of this section;" by substituting "and his" for "or their respective," and "next of kin" for "legal

representatives," and by omitting the proviso making the act applicable to pending cases, as not being in harmony with the general policy of the present act, namely, that it shall apply only to the estates of persons dying on or after a certain day, subsequent to the approval of the act.

(*d*) In any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of lawful wedlock, or shall heretofore have entered into the bonds of lawful wedlock, such child or children shall be legitimated for all purposes of inheritance by, from or through such child or children, under the provisions of this act, as if he or they had been born during the wedlock of his or their parents.

NOTE.—This is founded on Section 1 of the Act of May 14, 1857, P. L. 507, 3 Purd. 2445, modified so as to be limited to the purposes of the intestate law, so as to omit the requirement of cohabitation, and so as to extend that section to include inheritance, from or through such legitimated children. The provision that the act shall apply to past cases is in accord with the Act of April 21, 1858, P. L. 413, Section 1, 3 Purd. 2446, which provided that the Act of 1857 should be taken to apply to all cases within its terms prior to its date as well as those subsequent thereto.

The Commissioners recommend the omission of the requirement of cohabitation, as contained in the present law. As this has been construed by the courts: Clauer's Appeal, 11 W. N. C. 427; Agnew's Estate, 29 W. N. C. 520, the cohabitation need be only nominal; in cases of "forced" marriages, real cohabitation is rarely possible and sometimes very inadvisable.

SECTION 16 (*a*) Any minor or adult person adopted according to law and the adopting parent or parents shall, respectively, inherit and take by devolution from and through each other personal estate as next of kin and real estate as heirs, under the provisions of this act, as fully as if the person adopted had been born a lawful child of the adopting parent or parents.

NOTE.—This is founded on Section 1 of the Act of April 13, 1887, P. L. 53, 2 Purd. 2006, and upon the provisions as to inheritance contained in the various acts relating to adoption.

This and the other clause of the present section are intended to cover the entire subject of inheritance by and from adopted persons and seem to make it necessary to repeal the existing adoption acts, so far only, however, as they relate to inheritance.

The Act of May 9, 1889, P. L. 168, Section 1, 1 Purd. 280–281, relating to adoption of adults, provides that the adopted person shall inherit only as one of the children of the adopting parent, and that such adopted child and the lawful children of the adopting parent shall inherit from and through each other as if all had been lawful children of the same parents.

Section 1 of the Act of April 22, 1905, P. L. 297, 5 Purd. 5227, amending Section 1 of the Act of May 19, 1887, P. L. 125, 1 Purd. 279, which amended Section 7 of the Act of May 4, 1855, P. L. 431, contains the same provision.

Section 3 of the Act of June 1, 1911, P. L. 539, 5 Purd. 5228, relating to adoption of adults, provides that the adopted person and the adopting parent shall inherit and take from and through each other as fully as if the person adopted had been born the lawful child of the adopting parent. Section 4 of the same act provides that the adopted person and other children of the adopting parent, whether natural or adopted, shall inherit from and through each other. This act repeals the Act of 1889 above cited.

The Act of May 28, 1915, P. L. 580, 5 Purd. 5228, further amends Section 7 of the Act of May 4, 1855, above cited, by adding the provision that the adopting parent and the adopted child shall inherit and take from and through each other as fully as if the person adopted had been born a lawful child of the adopting parent.

(*b*) The person adopted shall, for all purposes of inheritance and taking by devolution, be a member of the family of the adopting parent or parents. The adoptive relatives of the person adopted shall be entitled to inherit and take from and through such person to the exclusion of his or her natural parents, grandparents and collateral relatives, but the surviving spouse of such adopted person and the children and descendants of

such adopted person shall have all his, her and their respective rights under this act. Adopted persons shall not be entitled to inherit or take from or through their natural parents, grandparents or collateral relatives, but each adopted person shall have all his or her rights under this act in the estates of his or her spouse, children and descendants.

NOTE.—This is founded on Section 4 of the Act of June 1, 1911, P. L. 539, 5 Purd. 5229, with an extension of its provisions so as to make the adopted person for all purposes of inheritance a member of the family of the adopting parent.

This seems to be in accordance with the policy indicated by Section 1 of the Act of April 13, 1887, P. L. 53, 2 Purd. 2006, which provides that "the adopting parents and their lawful heirs and kindred shall be treated and shall inherit from such adopted child, according to the intestate laws of this commonwealth, the same as though such adopted child were the natural child and heir-at-law of such adopting parents, to the exclusion of the natural parents, kindred and heirs-at-law of such adopted child, reserving to the husband and wife of such adopted child all his or her respective rights, under the intestate laws; * * * *Provided, however*, That this act shall only apply to such property as the adopted child shall have inherited or derived from the adopting parents or their kindred."

The proviso is omitted in accordance with what appears to be the legislative policy in the later statutes.

SECTION 17 (*a*) In default of known heirs or kindred, competent as aforesaid, the real estate of such intestate shall be vested in the surviving spouse of such intestate, if any, and the surviving spouse shall be entitled to the whole of the personal estate.

NOTE.—This is Section 10 of the Act of 1833, 2 Purd. 2001, substituting "surviving spouse" for "widow or surviving husband," and omitting the description of the estate, which is superfluous in view of Section 18 of the new act.

Section 10 of the Act of 1833 was copied from the Act of January 21, 1819, P. L. 25.

Neither the Act of April 19, 1794, 3 Sm. L. 143, nor the Act of April 4, 1797, 3 Sm. L. 296, contained any provision on this subject, nor did any such provision appear prior to the Act of 1819.

(*b*) If any person shall die, or has died intestate, leaving a surviving spouse and no known heirs or kindred, such surviving spouse, his or her heirs or legal representatives, may, at any time after the expiration of one year from the death of such intestate, and after final settlement of the administration accounts of such intestate, present a petition to the orphans' court of the county wherein any real estate of such intestate may lie, or, in the case of personal estate, to the orphans' court having jurisdiction of said administration accounts, setting forth that the said intestate died leaving no known heirs or kindred and seised or possessed of real or personal estate, which, by virtue of this act, vested in such surviving spouse. Such petition shall be verified by the oath or affirmation of the party petitioning, or of some other person knowing the facts.

Upon the presentation of said petition, the said court shall grant a citation to all the heirs or other persons interested or claiming any interest in said estate, to appear in said court at some time certain and show cause why a decree should not be made, ordering and directing, in the case of real estate, that the title thereto be adjudged to be in such surviving spouse, his or her heirs, or, in the case of personal estate, that the administrator or administrators of the estate of said intestate shall pay over to such surviving spouse, his or her legal representatives, the balance of such intestate's estate in his or their hands. Notice of such citation shall be published for such length of time and in such manner as the court in its discretion shall think proper.

If, upon the return of the citation and due proof of publication thereof, agreeably to the order of the court, no heirs or kindred claiming said estate shall appear, nor any good cause be shown to the contrary, the court shall order and decree as aforesaid, and, in the case of

real estate, a certified copy of such decree shall be recorded in the office of the recorder of deeds of the county where said real estate shall lie, in the deed book, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the name of the surviving spouse, and shall be registered in the survey bureau, or with the proper authorities empowered to keep a register of real estate, if any there be, in said county. The charges for recording and registering shall be the same as are provided by law for similar services. The record of such decree shall be deemed and held to be prima facie proof of the facts therein set forth with like force and effect as the record of a deed; and if, upon the return of any such citation, any person or persons shall appear in court claiming to be heirs or kindred of such intestate, whose rights to the said estate shall be disputed by such surviving spouse, his or her heirs or legal representatives, then the court may direct an issue to determine the matter, or may make such order therein as they shall think proper.

In all cases the decree of such court entered upon the failure of any heirs or kindred to appear, or after the trial of such an issue, or otherwise, shall not be subject to be reopened by said court after the expiration of six months from the date of its entry, except as hereinafter provided. Any such cause may be removed by appeal to the supreme court or superior court, in the same manner as appeals are now taken by law in cases determined in the orphans' court or tried by jury upon issues directed by that court. Where the record in such cause is thus removed to an appellate court, the six months' period within which the decree is subject to be reopened by the orphans' court shall cease to run until the return of the record from the appellate court.

NOTE.—This is Section 1 of the Act of April 6, 1833, P. L. 207, 2 Purd. 2001–2, modified so as to include the procedure in cases of real estate in the same or other counties and by adding provisions for recording and as to the conclusiveness of the decree.

The provision as to recording is copied from the Act of June 20, 1883, P. L. 131, 2 Purd. 2004, providing a procedure whereby any person taking lands under the intestate laws may show on the records of the orphans' court and the recorder of deeds his interest in such lands. The Commissioners recommend the repeal of the Act of 1883 as unnecessary or ineffective.

The Act of April 6, 1833, does not seem to have been drafted by the Commissioners to Revise the Civil Code, and no previous act containing similar provisions has been found.

SECTION 18. The real estate of such intestate shall be vested in the person or persons entitled thereto under the provisions of this act for such estate as the intestate had therein, and such person or persons shall be entitled to the personal estate absolutely.

NOTE.—This is a new section, introduced in order to avoid the necessity of repeating the description of the estates to be taken under the various preceding sections.

SECTION 19. Wherever real or personal estate shall descend to or be distributed among several persons, whether lineal or collateral heirs or kindred, standing in the same degree of consanguinity to the intestate, if there shall be only one of such degree, he shall take the whole of such estate, and if there shall be more than one, they shall take in equal shares, and if real estate, shall hold the same as tenants in common.

NOTE.—This is Section 14 of the Act of 1833, 2 Purd. 2002, omitting after "wherever," the words "by the provisions of this act, it is directed." Section 1 of the Act of June 30, 1885, P. L. 251, 2 Purd. 2002, making the same provision, was passed in consequence of the decision in Hayes's Appeal, 89 Pa. 256, that the children of deceased uncles and aunts, taking by representation under Section 2 of the Act of April 27, 1855, P. L. 368, 2 Purd. 1999, were not within the scope of Section 14 of the Act of 1833, and took per stirpes and not per capita, although no uncles or aunts survived.

Since Section 2 of the Act of 1855 is embodied in Section 11 of the new act, the provisions of the new Section 19 clearly include first cousins.

There seems to have been no similar provision in the acts previous to 1833.

SECTION 20. Descendants and relatives of an intestate, begotten before the death of the intestate and born thereafter, shall in all cases inherit and take in like manner as if they had been born in the lifetime of such intestate.

NOTE.—This is Section 13 of the Act of 1833, 2 Purd. 2002, which was founded on Section 10 of the Act of April 19, 1794, 3 Sm. L. 143. That section provided: "That all posthumous children shall, in all cases whatsoever, inherit in like manner, as if they were born in the lifetime of their respective fathers."

SECTION 21. All relatives and persons concerned in the estate of any intestate who shall not lay legal claim to their respective shares of the personal estate within seven years of the decease of the intestate, shall be debarred from the same forever: *Provided*, That if any such relative or person shall, at the time of the decease of the intestate, be within the age of twenty-one years, he or she shall be entitled to receive and recover the same, if he or she shall lay legal claim thereto within seven years after coming to full age.

NOTE.—This is Section 19 of the Act of 1833, 2 Purd. 2003, with the insertion of the words "of the personal estate" in accordance with the decisions cited in the note to Purdon, and the omission of the saving as to married women.

Section 19 of the Act of 1833 was founded on Section 18 of the Act of April 19, 1794, 3 Sm. L. 143, the revisers omitting the saving of persons *non compos mentis*, in prison or out of the United States.

The Act of 1684 (172nd Law) imposed a limitation of three years. The Act of 1693 (3 Sm. L. 154 n.) provided the same limitation. The Act of 1700 (3 Sm. L. 155 n.) made the limitation seven years. Section 5 of the Act of 1705 (3 Sm. L. 157 n.) read: "That all such of the intestate's relations, and persons concerned, who shall not lay legal claim to their respective shares, within seven years after the decease of the intestate, shall be debarred from the same forever."

SECTION 22. If any person, other than a surviving spouse, entitled under the provisions of this act to in-

herit or take real or personal property from such intestate, shall have any estate by settlement of such intestate, or shall have been advanced by him in his lifetime, either in real or personal estate, the amount of such settlement or advancement shall be charged against the share of the person who shall have received it, so that the total amount received by him, including the amount of such settlement or advancement, shall not exceed the amount received by each of the other persons who are equally entitled under the provisions of this act to inherit or take from said intestate.

NOTE.—This is founded on Section 16 of the Act of 1833, 2 Purd. 2002, which contained in substance the provisions of Section 9 of the Act of April 19, 1794, 3 Sm. L. 143, the changes now made being for the purpose of including all persons entitled under the act and simplifying the language.

Section 2 of the Act of 1705 (3 Sm. L. 156 n.) contained a provision similar to that of the Act of 1794.

The Act of March 13, 1815, P. L. 173, provided for the appointment of three auditors to settle the amount of advancements where some of the heirs resided out of the state, and for the procedure by the auditors. It is stated in a note in Pepper and Lewis' Digest of Laws that this act was supplied by Section 20 of the Act of March 29, 1832, P. L. 190. The Act of 1815 does not appear in Stew. Purd. It is now recommended for repeal.

SECTION 23. No person who shall be finally adjudged guilty, either as principal or accessory, of murder of the first or second degree, shall be entitled to inherit or take any part of the real or personal estate of the person killed, as surviving spouse, heir or next of kin to such person under the provisions of this act.

NOTE.—This is a new section framed to meet the situation presented in Carpenter's Estate, 170 Pa. 203. In that case, a son killed his father, was convicted of murder and was executed therefor. His mother, the widow of the intestate, was convicted as an accessory after the fact and duly sentenced. The motive of the crime was to get possession of the estate of the decedent, and the supreme court was constrained to hold that the criminals had not forfeited their rights under the intestate law.

This decision, although criticised on equitable grounds: 36 American Law Register N. S. 225; 64 University of Pennsylvania Law Review 307, is nevertheless in accordance with the weight of authority: see *In Re* Houghton (1915) 2 Ch. 173; 15 Columbia Law Review 260, 275; but it appears shocking to morality that an heir should be permitted to profit by his crime.

The Commissioners in their draft of the Wills Act herewith submitted have embodied a similar provision applicable to the case of a devisee or legatee, in order that the same rule may apply. The Commissioners are of opinion however that the guilt of the party charged with the crime should be determined by his conviction in the proper forum.

SECTION 24. In default of all such known heirs or kindred, or surviving spouse, competent to take as aforesaid, the real and personal estate of such intestate shall go to and be vested in the commonwealth by escheat.

NOTE.—This is Section 12 of the Act of 1833, 2 Purd. 2002, with the addition of the words, "competent to take."

The section was introduced in the Act of 1833 for the purpose of completing the system, and was taken from the Act of September 29, 1787, 2 Sm. L. 425.

SECTION 25. Nothing in this act contained, relative to a distribution of personal estate among kindred, shall be construed to extend to the personal estate of an intestate whose domicile, at the time of his death, was out of this commonwealth.

NOTE.—This is Section 20 of the Act of 1833, 2 Purd. 2004, which was new in the Act of 1833.

SECTION 26. This act shall be known and may be cited as the Intestate Act of 1917.

SECTION 27. This act shall take effect on the thirty-first day of December, 1917, and shall apply to the estates, real and personal, of all persons dying intestate on or after said day. As to the estates, real and personal, of all persons dying before that day, the existing laws shall remain in full force and effect.

SECTION 28. This Act of Assembly is intended as an entire and complete system for the descent and distribution of the estates, real and personal, of persons dying intestate. The following acts and parts of acts of assembly are hereby repealed as respectively indicated, but so far only as relates to the estates, real and personal, of any person or persons dying intestate on or after the thirty-first day of December, 1917. The repeal of the first section of an act shall not repeal the enacting clause.

Sections 3 to 13 inclusive and 18 of an act entitled "An Act directing the descent of intestates' real estates, and distribution of their personal estates, and for other purposes therein mentioned," passed April 19, 1794, 3 Sm. L. 143, absolutely.

Sections 5, 6 and 7 of an act entitled "An Act supplementary to the act, entitled 'An Act directing the descent of intestates real estates, and distribution of their personal estates, and for other purposes therein mentioned,'" passed April 4, 1797, 3 Sm. L. 296, absolutely.

An act entitled "An Act for the settlement of the estates of intestates, where some of the heirs reside out of the state," approved March 13, 1815, P. L. 173.

An act entitled "An Act relative to escheated estates," approved January 21, 1819, P. L. 25, absolutely.

An act entitled "A supplement to an act entitled 'An Act relative to escheated estates,' passed the twenty-first of January, eighteen hundred and nineteen," approved April 6, 1833, P. L. 207, absolutely.

An act entitled "An Act relating to the descent and distribution of the estates of intestates," approved April 8, 1833, P. L. 315, absolutely.

Section 9 of an act entitled, "A supplement to an act, entitled 'An Act relative to the LeRaysville Phalanx,' passed March, Anno Domini one thousand eight hundred and forty-seven, and relative to obligors and obligees, to secure the right of married women, in relation to defalcation, and to extend the boundaries of the borough of Ligonier," approved April 11, 1848, P. L.

536, in so far as it relates to the distribution of the personal estate of a deceased married woman, and section 10 of said act, absolutely.

Section 2 of an act entitled "An Act to amend certain defects of the law for the more just and safe transmission and secure enjoyment of real and personal estate," approved April 27, 1855, P. L. 368, absolutely, and section 3 of said act in so far as it relates to inheritance.

Section 5 and the proviso to Section 7 of an act entitled "An Act relating to certain duties and rights of husband and wife, and parents and children," approved May 4, 1855, P. L. 430, absolutely.

An act entitled "An Act to legitimate children born out of lawful wedlock," approved May 14, 1857, P. L. 507, in so far as it relates to inheritance.

An act entitled "An Act permitting illegitimates to inherit from each other in certain cases," approved June 5, 1883, P. L. 88, absolutely.

An act entitled "An Act to facilitate the proof and record of the title of real estate vested in the heirs of certain intestates," approved June 20, 1883, P. L. 131, absolutely.

An act entitled "An Act providing for the manner in which estates of intestates shall be distributed, where the distributees stand in the same degree of consanguinity to the intestate," approved June 30, 1885, P. L. 251, absolutely.

An act entitled "An Act relating to the mode of inheriting from, through, or by, a child or children adopted according to law, and being a supplement to an act, entitled 'An Act relating to certain duties of husband and wife, and parents and children,' approved the fourth day of May, one thousand eight hundred and fifty-five," approved April 13, 1887, P. L. 53, absolutely.

The proviso to Section 1 of an act entitled "An Act amending section seventh of an act, entitled 'An act relating to certain duties and rights of husband and wife, and parents and children,' approved the fourth day of

May, Anno Domini one thousand eight hundred and fifty-five, providing that married men or women, in case of drunkenness or profligacy of husbands or wives, may consent to the adoption of their children," approved May 19, 1887, P. L. 125, absolutely.

An act entitled "An Act relating to estates of intestates, providing that children and descendants of deceased grand-parents shall represent such deceased grand-parents whenever grand-parents are entitled as next of kin to intestates," approved May 25, 1887, P. L. 261, absolutely.

The first proviso to Section 1 of an act entitled "An Act relating to the adoption of any person as an heir," approved May 9, 1889, P. L. 168, absolutely.

An act entitled "An Act to amend the third section of the act, entitled 'An Act to amend certain defects of the law for the more just and safe transmission and secure enjoyment of real and personal estate,' approved the twenty-seventh day of April, Anno Domini one thousand eight hundred and fifty-five, providing that illegitimate children shall take their mother's name, and she and her mother, and they and their issue, shall be capable to take or inherit from each other," approved June 14, 1897, P. L. 142, in so far as it relates to inheritance.

An act entitled "An Act to allow legitimate and illegitimate children, born from the same mother, dying without children, to inherit real and personal property from each other, in exclusion to the grandmother of the illegitimate child or children, as though they had been born in lawful wedlock," approved June 10, 1901, P. L. 551, absolutely.

Sections 2, 3 and 4 of an act entitled "An Act to regulate and define the legal relations of an illegitimate child, or children, its or their heirs, with each other and the mother and her heirs," approved July 10, 1901, P. L. 639, absolutely.

An act entitled "An Act to amend an act, entitled 'An Act to regulate and define the legal relations of an illegitimate child or children, its or their heirs with each

other and the mother and her heirs, approved the tenth day of July, Anno Domini one thousand nine hundred and one; and applying and extending it to all cases, now pending, where the estate of such illegitimate or mother has not been actually paid to and received by collateral heirs or the Commonwealth," approved March 26, 1903, P. L. 70, absolutely.

The proviso to Section 1 of an act entitled "An Act to amend an act, entitled 'An act amending section seventh of an act, entitled "An act relating to certain duties and rights of husband and wife and parents and children," approved the fourth day of May, Anno Domini one thousand eight hundred and fifty-five, providing that married men or women, in case of drunkenness or profligacy of husbands or wives, may consent to the adoption of their children,'" approved April 22, 1905, P. L. 297, absolutely.

An act entitled "An Act to amend section one of an act, entitled 'An Act relating to the descent and distribution of the estates of intestates,' passed and approved April eighth, one thousand eight hundred and thirty-three, defining and declaring the interest that shall descend to and vest in the surviving husband or wife of such intestate," approved April 1, 1909, P. L. 87, absolutely.

Sections 3 and 4 of an act entitled "An Act relating to the adoption of adult persons as heirs," approved June 1, 1911, P. L. 539, in so far as they relate to inheritance and devolution under the intestate laws.

An act entitled "A supplement to an act, entitled 'An Act to amend section one of an act, entitled "An Act relating to the descent and distribution of the estates of intestates," passed and approved April eighth, one thousand eight hundred and thirty-three, defining and declaring the interest that shall descend to and vest in the surviving husband or wife of such intestate,' approved April first, Anno Domini one thousand nine hundred and nine," approved July 21, 1913, P. L. 872, absolutely.

An act entitled "An Act amending article two of section one of an act, entitled 'An Act relating to the descent and distribution of the estates of intestates,' approved the eighth day of April, one thousand eight hundred thirty-three, as amended, by further regulating the appointment and number of appraisers," approved July 21, 1913, P. L. 875, absolutely.

An act entitled "An Act to amend an act, approved the fourth day of May, one thousand eight hundred and fifty-five, entitled 'An Act relating to certain duties and rights of husband and wife and parents and children,'" approved May 3, 1915, P. L. 234, absolutely.

An act entitled "An Act amending section one of an act, entitled 'An Act amending section seven of an act, entitled "An act relating to certain duties and rights of husband and wife, and parents and children," approved the fourth day of May, Anno Domini one thousand eight hundred and fifty-five; providing that married men or women, in case of drunkenness or profligacy of husbands or wives, may consent to the adoption of their children,' approved the nineteenth day of May, Anno Domini one thousand eight hundred and eighty-seven," approved May 28, 1915, P. L. 580, in so far as it relates to inheritance and devolution under the intestate laws.

All other acts of assembly, or parts thereof, that are in any way in conflict or inconsistent with this Act or any part thereof, are hereby repealed, so far as relates to the estates, real and personal, of any person or persons dying intestate on or after the thirty-first day of December 1917.

WILLS ACT.

TABLE OF CONTENTS.

PAGE

SECTION 1. Who may make wills and what may be disposed of..... 56

SECTION 2. Form and execution of wills..... 57

SECTION 3. Execution of wills by mark or cross..... 58

SECTION 4. Nuncupative wills:
(*a*) When and where to be executed..... 59
(*b*) Requisites where bequest is over $100..... 60
(*c*) Proof after expiration of six months..... 60

SECTION 5. Wills of mariners and soldiers..... 60

SECTION 6. Bequests and devises for religious and charitable uses.. 61

SECTION 7. Emblements, crops, rents and periodical payments accruing to tenants for life and others..... 62

SECTION 8. Testamentary guardians:
(*a*) Appointment by father..... 63
(*b*) Appointment by mother..... 63
(*c*) Forfeiture of right by neglect of parental duty..... 64

SECTION 9. Wills to be construed as if executed immediately before death of testator..... 64

SECTION 10. After acquired real estate to pass by general devise..... 65

SECTION 11. General devise or bequest to operate as execution of general power of appointment..... 65

SECTION 12. Devises of real estate to pass whole estate of testator.. 66

SECTION 13. Devise of real estate in fee tail construed as estate in fee simple..... 66

SECTION 14. Construction of "die without issue" and similar phrases. 66

SECTION 15. Lapsed and void devises and legacies:
(*a*) Devise or legacy in favor of lineal descendants not to lapse by death..... 67
(*b*) Devise or legacy in favor of brothers and sisters and their children not to lapse by death in certain cases.. 67
(*c*) Lapsed and void devises and legacies to fall into residue; provisions where such legacies and devises are contained in the residuary clause..... 69

PAGE

SECTION 16. Devise or legacy to children to include adopted children:
(*a*) Children adopted by testator 69
(*b*) Children adopted by devisee or legatee 70

SECTION 17. Pecuniary legacies to be charged on residuary real estate. 70

SECTION 18. Devises of real estate subject to mortgage 71

SECTION 19. Spendthrift trusts; income to be liable for maintenance of wife and minor children 72

SECTION 20. Revocation of wills:
(*a*) Wills of lands 72
(*b*) Wills of personalty 73

SECTION 21. Revocation of wills *pro tanto* by subsequent marriage or birth of children 73

SECTION 22. Forfeiture of rights by devisee or legatee who murders the testator 75

SECTION 23. Election to take under or against wills:
(*a*) Right of surviving spouse to elect to take against will of deceased spouse 75
(*b*) How election to be manifested and within what time .. 75
(*c*) No payments to be required before election 76
(*d*) Surviving spouse may be cited to make election 76
(*e*) Election of surviving spouse or decree of court where there is a failure to elect to be recorded and filed 76

SECTION 24. Act not to apply to wills of personal estate executed by testator domiciled without the commonwealth 77

SECTION 25. Short title section 77

SECTION 26. When act shall go into operation 78

SECTION 27. Repealer 78

AN ACT

Relating to the form, execution, revocation and interpretation of wills, to nuncupative wills, to the appointment of testamentary guardians, to spendthrift trusts, to forfeiture of devise or legacy in case of murder of testator, to elections to take under or against wills, and to the recording and registering of such elections and of decrees relative thereto and to the fees therefor.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That every person of sound mind and of the age of twenty-one years or upwards, whether married or single, may dispose by will of his or her real estate, whether such estate is held in fee simple or for the life or lives of any other person or persons, and whether in severalty, joint tenancy or common, and also of his or her personal estate.

NOTE.—This is Section 1 of the Act of April 8, 1833, P. L. 249, 4 Purd. 5109–18, amended by inserting the words, "of the age of twenty-one years or upwards, whether married or single." This obviates the necessity for a separate section as to minors, thus supplying Section 3 of the Act of 1833, 4 Purd. 5120. It also supplies Section 7 of the Act of April 11, 1848, P. L. 537, 4 Purd. 5119 (which supplied Section 2 of the Act of 1833) providing that a married woman might dispose of her separate property by will executed in the presence of two or more witnesses, neither of whom should be her husband. It likewise supplies Section 5 of the Act of June 8, 1893, P. L. 345, 4 Purd. 5119, empowering married women to make wills as if unmarried, which act repealed the married persons' property act of June 3, 1887, P. L. 332.

The provision in Section 1 of the Act of 1833 as to estates held for the lives of others was copied from the Statute of 29 Charles II, Chapter 3, Section 12; and the provision as to joint tenancy followed the Act of March 31, 1812, 5 Sm. L. 395, 2 Purd. 2031, which provides that if partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but shall descend

or pass by devise, and be considered to every intent and purpose in the same manner as if such deceased joint tenants had been tenants in common.

Apropos of a suggestion that the testamentary age be reduced to eighteen years, it may be noted that in the draft submitted by the Commissioners in 1832, it was provided that wills of personal estate alone might be made by persons of the age of eighteen years or upwards, but this was not approved by the legislature.

SECTION 2. Every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction; and in all cases, shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall be of no effect: *Provided*, That the presence of dispositive or testamentary words or directions, or the appointment of an executor or the like, after the signature to a will, whether written before or after the execution thereof, shall not invalidate that which precedes the signature.

NOTE.—This is Section 6 of the Act of 1833, 4 Purd. 5120–26, with the addition of the proviso.

The Commissioners in 1832 remarked that it was then the law of Pennsylvania that real or personal property might be transferred by a will without signature, seal or attesting witness, and although the will was not in the handwriting of the testator. Their draft of Section 6 was passed without alteration except that, after the words "shall be proved" there were omitted the words "before the register having jurisdiction thereof."

In the Laws Agreed upon in England, 5 Sm. L. 416, Section 15, it was provided that: "All wills and writings, attested by two witnesses, shall be of the same force as to lands, as other conveyances, being legally proved within forty days, either within or without the said province."

The Act of 1705, 1 Sm. L. 33, "concerning the probates of written and nuncupative wills, and for confirming the devises of lands," was largely derived from the Statute of 29 Charles II, Chapter 3, but omitted Sections 5 and 6 of that statute, which prescribed the forms of execution and revocation of wills of lands. Section 1 of the Act of 1705

provided "That all wills in writing, wherein or whereby any lands, tenements or hereditaments, within this province, have been, are, or shall be devised (being proved by two or more credible witnesses, upon their solemn affirmation, or by other legal proof in this province, or being proved in the Chancery in England, etc.,) shall be good and available in law, for the granting, conveying and assuring of the lands or hereditaments thereby given or devised, as well as of the goods and chattels thereby bequeathed."

The first part of the section as now reported is copied from the present law. Its language is vague, if it be literally interpreted, but its meaning has been so often elucidated by the decisions of the courts that the Commissioners have felt it to be unwise to remould it, and, for the sake of achieving technical clarity of expression, raise new questions which would excite litigation. The Commissioners are not aware that any change is demanded as to the execution and proof of wills, and have purposely avoided the requirement of subscribing witnesses, which in many other jurisdictions is the rule. It is desirable that the law should be as simple and free from technicality as possible, and if subscribing witnesses were necessary many wills would be unjustly avoided. Our present law has proved very satisfactory in this regard, and an innovation does not appear to be advisable.

The Commissioners, however, recommend in the proviso to this section a change induced by the decision in Wineland's Appeal, 118 Pa. 37. The legislative requirement that a will shall be signed at the end thereof, the natural and proper place for the signature, was a judicious improvement upon the law as it previously existed; but the Commissioners are of opinion that the presence of testamentary provisions after the signature, even if written before the signature is affixed, should not invalidate what the testator by his signature has authenticated.

SECTION 3. If the testator be unable to sign his name, for any reason other than the extremity of his last sickness, a will to which his name is subscribed in his presence, by his direction and authority, and to which he makes his mark or cross, unless unable so to do, in which case the mark or cross shall not be required, shall be as valid as though he had signed his name thereto: *Provided*,

That such will shall be proved by the oaths or affirmations of two or more competent witnesses.

NOTE.—This is substituted for Section 1 of the Act of January 27, 1848, P. L. 16, 4 Purd. 5126–7, omitting the provisions as to wills theretofore made.

Section 1 of the Act of 1848 reads as follows:

> "Every last will and testament heretofore made or hereafter to be made, excepting such as may have been finally adjudicated, prior to the passage of this act, to which the testator's name is subscribed, by his direction and authority, or to which the testator hath made his mark or cross, shall be deemed and taken to be valid in all respects, *Provided*, The other requisites under existing laws are complied with."

This phraseology is clearly open to criticism, as it might be understood to mean that a will, signed by the direction of the testator, although not in his presence, and although he was not in the extremity of his last illness, would be good, which, of course, would be inconsistent with the preceding requirements.

The Commissioners are of opinion that this section of the Act of 1848 should be corrected in its phraseology, as an exception to their general method of revision, for its reformation, unlike that of Section 6 of the Act of 1833, last preceding, is not complicated by any long series of judicial decisions; and it seems desirable to clarify its language before any questions such as have been suggested may arise.

The new section is intended to cover cases where a person is unable to sign his name, whether from lack of education or from physical weakness. The provision that the mark may be dispensed with if the testator be unable to make a mark is intended to cover such a case as that of a man who has lost both arms or is paralysed.

SECTION 4. Personal estate may be bequeathed by a nuncupative will, under the following restrictions:

(*a*) Such will shall in all cases be made during the last sickness of the testator, and in the house of his habitation or dwelling, or where he has resided for the space of ten days or more, next before the making of such will; except

where such person shall be surprised by sickness, being from his own house.

NOTE.—This is clause I of Section 7 of the Act of 1833, 4 Purd. 5127, omitting at the end the words "and shall die before returning thereto." These words seem unnecessary and might invalidate a nuncupative will made in a hospital should the testator be removed to his own home before death.

Section 7 of the Act of 1833 was derived from Section 3 of the Act of 1705, 1 Sm. L. 33, the changes made by the Commissioners of 1830 being the substitution in clause (*b*) of $100 for £30, and the placing of this limitation in the second clause instead of the first.

The Act of 1705 was derived from the Statute of 29 Charles II.

(*b*) Where the sum or value bequeathed shall exceed one hundred dollars, it shall be proved that the testator, at the time of pronouncing the bequest, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect; and in all cases, the foregoing requisites shall be proved by two or more witnesses, who were present at the making of such will.

NOTE.—This is clause II of Section 7 of the Act of 1833, 4 Purd. 5128. See the note to clause (*a*).

(*c*) No testimony shall be received to prove any nuncupative will after six months elapsed from the speaking of the alleged testamentary words, unless the said testimony, or the substance thereof, were committed to writing within six days after the making of said will.

NOTE.—This is Section 11 of the Act of March 15, 1832, P. L. 137, 4 Purd. 5128, which was derived from Section 4 of the Act of 1705, 1 Sm. L. 33, with merely verbal changes. In line 3, "alleged" has now been substituted for "pretended," as being more in conformity with the modern use of the words.

SECTION 5. Nothwithstanding this act, any mariner being at sea, or any soldier being in actual military service,

may dispose of his movables, wages and personal estate, as he might have done before the making of this act.

NOTE.—This is Section 8 of the Act of 1833, 4 Purd. 5128, which was copied from Section 7 of the Act of 1705, 1 Sm. L. 33. There were omitted, however, in the Act of 1833, the words, "or person" after "mariner," and the words, "or they" after "as he." The Commissioners of 1830 remarked, in reference to the change thus made: "By extending the provisions to all other *persons* at sea it is conceived that there would be some danger of those evils in respect to the disposition of property by verbal wills against which it was the object of a previous section to guard."

Under the present law and the decisions of the courts, mariners at sea and soldiers in actual military service have the same privileges in the making of wills that they would have enjoyed if the English Statute of Frauds and our Acts of 1705 and 1833 had never been passed, as all of these statutes have expressly excluded such wills; the wills, though oral, must however be proved by two witnesses: Smith's Will, 6 Phila. 104; Drummond *vs.* Parish, 3 Curteis Ecc. 522.

While the Commissioners are aware of the dangers attending oral wills, they have concluded to recommend the exception here made in favor of mariners and soldiers, as a class of persons who have always been regarded with peculiar indulgence by the law of England as well as by the Roman law, in which this exception originated.

Nuncupative wills in general have been so safeguarded by the requirements of the preceding sections, that the Commissioners do not believe that any serious consequences will ensue from their retention. Such wills seldom occur in practice, and yet their total abolition might produce inconvenience in cases proper for them.

SECTION 6. No estate, real or personal, shall be bequeathed or devised to any body politic, or to any person in trust, for religious or charitable uses, except the same be done by will attested by two credible, and, at the time, disinterested witnesses, at least thirty days before the decease of the testator; and all dispositions of property contrary hereto shall be void, and go to the residuary legatee or devisee, heirs or next of kin, according to law. A disinterested witness, within the meaning of

this section, is a witness not interested in such religious or charitable use, this section not being intended to apply to a witness interested in some other devise or bequest in the same instrument.

NOTE.—This is Section 1 of the Act of June 7, 1911, P. L. 702, 7 Purd. 7766, altered so as to apply to wills only, and by transferring the definition of "a disinterested witness" to the end of the section. Another statute should be passed relating to gifts otherwise than by will, so as to make the law uniform. The Act of 1911 amended Section 11 of the Act of April 26, 1855, P. L. 332, 1 Purd. 595, by adding the definition of a disinterested witness, which has been construed by the supreme court in Palethorp's Estate, 249 Pa. 411.

Much might perhaps be said in favor of the abolition of the prohibition of bequests and devises for charitable and religious uses made within any definite period of time before the death of the testator. The Commissioners have concluded to make no recommendation on this subject to the Legislature. They have, however, substituted for the period of one calendar month, that of thirty days, for the reason that the calendar months of the year do not contain the same number of days, and the provision should be uniform.

SECTION 7. The emblements or crops growing on lands held by a widow in dower, or by any other tenant for life, may be disposed of by will as other personal estate. Rents and other periodical payments accruing to any tenant for life, or to any other person entitled under the laws of this commonwealth regulating the descent and partition of real estate, may, so far as the same may have accrued on the day of death of such tenant for life, or other person, be disposed of by will, in like manner.

NOTE.—This is Section 5 of the Act of 1833, 4 Purd. 5120, with one change. The draft prepared by the Commissioners in 1832 read, "The emblements *or* crops." The Act of 1833 reads, "The emblements *of* crops." This

is evidently a clerical or typographical error. The original reading is restored.

The Commissioners in 1832 reported that they had incorporated in Section 5 a part of the Statute of 20 Henry III, Chapter 2, relating to widows, and added a power to all life tenants to dispose of by will of crops, rents, etc.

SECTION 8 (*a*) Every person competent to make a will, being the father or adopting father of any minor child unmarried, may appoint a testamentary guardian for such child during his or her minority, or for any shorter period: *Provided*, That such testamentary guardian shall not be entitled to the custody of the person of such child unless the mother or adopting mother, if surviving, shall relinquish such custody, or unless the best interests of the child shall require that such surviving mother or adopting mother should not retain the custody of the person of such child.

NOTE.—This is founded on Section 4 of the Act of April 8, 1833, as amended by the Act of April 15, 1915, P. L. 124, 7 Purd. 7767. It is altered so as to distinguish between guardianship of the person and of the estate, giving the father the right to appoint a guardian but making the question of the custody of the person depend upon the consent of the mother and the best interests of the child. Provisions to include adopted children have been added.

The provision as to appointment of a guardian by the mother is omitted from this clause and covered by the next.

(*b*) Every person competent to make a will, being the mother or adopting mother of any minor child unmarried, may appoint a testamentary guardian for such child during his or her minority, or for any shorter period, whenever the father or adopting father of such child shall be deceased and has not appointed such a guardian. Such mother or adopting mother, who shall leave to such child an estate, either real or personal, may appoint a testamentary guardian for such estate of the child, whether the father or adopting father of such child shall be living or dead, and whether he shall or shall

not have appointed a testamentary guardian for such child.

NOTE.—This is founded on Sections 1 and 2 of the Act of June 10, 1881, P. L. 96, 4 Purd. 5152; the Act of April 15, 1915, P. L. 124, 5 Purd. 5887; and the Act of April 21, 1915, P. L. 145, 5 Purd. 5887, and involves the repeal of these acts.

The language of the Act of April 15, 1915, giving to "the father or the mother" the right to devise the custody of a minor child in all cases, leaves it doubtful whether, the father having died appointing a guardian, the mother may also appoint a general guardian by her will, and *vice versa*.

Provisions to include adopted children have been added. The provision that a mother, appointed guardian by her husband's will, may appoint a successor, has been omitted as unnecessary.

(*c*) No father who shall have, for one year or upwards previous to his death, wilfully neglected or refused to provide for his child or children, and no mother who shall have, for a like period, deserted her child or children or failed to perform her parental duties, shall have the right to appoint any testamentary guardian for such child or children.

NOTE.—This is Section 6 of the Act of May 4, 1855, P. L. 431, 4 Purd. 5152, omitting the words "as aforesaid" before the words "for one year or upwards," and adding a corresponding provision as to the mother. Section 1 of the Act of May 25, 1887, P. L. 264, 4 Purd. 5152, giving the mother a right to appoint a guardian in case of desertion by the husband, is superseded by clause (*b*) *supra*, and should be repealed.

SECTION 9. Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

NOTE.—This is Section 1 of the Act of June 4, 1879, P. L. 88, 4 Purd. 5144, which was declaratory of the

common law rule as to personal property, and was copied from the statute of 7 William IV and 1 Vict., Chapter 26, Section 24; 8 Rev. Stat. 34.

The Act of 1879 "was enacted to complete what had only been partially effected by the Act of 1833." Opinion of Clark, J., in Fidelity Ins. T. & S. D. Co.'s Appeal, 108 Pa. 492, 499. See also, Williams *vs.* Brice, 201 Pa. 595, 597.

SECTION 10. The real estate acquired by a testator after making his will shall pass by a general devise, unless a contrary intention be manifest on the face of the will.

NOTE.—This is Section 10 of the Act of 1833, 4 Purd. 5139, which is similar to Section 23 of the Statute of 7 William IV and 1 Vict., Chapter 26. It has been retained, although it might be considered unnecessary in view of the broader provisions of the Act of 1879, embodied in the last preceding section.

SECTION 11. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. In like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

NOTE.—This is Section 3 of the Act of 1879, 4 Purd. 5145–6. See the note to section 9 of the present draft.

Section 4 of the Act of 1879, 4 Purd. 5146, provides: "This act shall operate upon and go into effect as to the wills of all persons who shall die after the date of this act." This is covered by the general section of the present act fixing the time when the act shall go into effect.

SECTION 12. All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over, or by words of limitation, or otherwise, in the will, that the testator intended to devise a less estate.

NOTE.—This is Section 9 of the Act of 1833, 4 Purd. 5137–8. Before that Act, a devise did not carry a fee unless there were words of inheritance or other language showing an intention that a fee should pass. The Commissioners in 1832 reported that this section coincided with the improvement made in this respect in many other states.

SECTION 13. Whenever by any devise an estate in fee tail would be created according to the common law of this state, such devise shall be taken and construed to pass an estate in fee simple, and as such shall be inheritable and freely alienable.

NOTE.—This is Section 1 of the Act of April 27, 1855, P. L. 368, 2 Purd. 1485, altered so as to apply to wills only. The Act of 1855 should not be repealed so far as it relates to deeds.

SECTION 14. In any devise or bequest of real or personal estate, the words, "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will in which such devise or bequest is made.

NOTE.—This is Section 1 of the Act of July 9, 1897, P. L. 213, 4 Purd. 5146–8, altered so as to apply to devises and bequests only. The Act of 1897, so far as it relates to gifts and grants, is not to be repealed. Section 2 of that act, limiting its application to instruments made after its passage, is covered by Section 26 of the new act.

SECTION 15 (*a*) No devise or legacy in favor of a child or children, or other lineal descendant or descendants of any testator, whether such children or descendants be designated by name or as a class, shall lapse or become void by reason of the decease of such legatee or devisee in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favor of such surviving issue, with like effect as if such devisee or legatee had survived the testator, unless the testator shall in the will direct otherwise.

NOTE.—This is Section 12 of the Act of April 8, 1833, P. L. 250, 4 Purd. 5142, which was founded on the Act of March 19, 1810, P. L. 96, modified so as to conform to the phraseology of the clause next following.

Section 12 of the Act of 1833 has been judicially construed to include legacies to children or grandchildren as a class, the principle of Gross's Estate, 10 Pa. 360, not having been applied to this section; see Bradley's Estate, 166 Pa. 300. The phraseology, however, has been changed by way of precaution in order to prevent any question upon the subject.

(*b*) Where any testator shall not leave any lineal descendants who would receive the benefit of any lapsed or void devise or legacy, no devise or legacy made in favor of a brother or sister, or of brothers or sisters of such testator, or in favor of the children of a brother or sister of such testator, whether such brothers or sisters or children of brothers or sisters be designated by name or as a class, shall be deemed or held to lapse, or become void by reason of the decease of such devisee or legatee in

the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favor of such surviving issue, with like effect as if such devisee or legatee had survived the testator, unless the testator shall in the will direct otherwise.

NOTE.—The Act of May 6, 1844, Section 2, P. L. 565, saved from lapse devises and legacies "made in favor of a brother or sister or the children of a *deceased* brother or sister of any testator, such testator not leaving any lineal descendants." It having been held in Gross's Estate 10 Pa. 360, and Guenther's Appeal, 4 W. N. C. 41, that this act did not apply to a bequest to the legatees as a class, the Act of July 12, 1897, P. L. 256, 4 Purd. 5143–4, amended the Act of 1844 by expressly providing for class legacies.

The Act of 1897 also amended the law by striking out the word "deceased," so that the provisions of the act should apply to the children of brothers or sisters, whether or not their parent was deceased, a requirement which seems irrelevant.

The section as now reported follows the language of the Act of 1897, but further amends it by limiting it to cases where the testator "shall not leave any lineal descendants who would receive the benefit of any lapsed or void devise or legacy." This was probably the legislative intent, for the provision saving from lapse legacies to certain legatees should not depend upon the mere fact that the testator did not leave lineal descendants, unless those descendants would profit by the lapse or failure of the legacies. It was probably assumed by the legislature heretofore that if the testator left lineal descendants they would be included among his residuary devisees or legatees, and thus receive the benefit of the lapsed devises and legacies, but this is not necessarily the case.

The Commissioners have not deemed it expedient to recommend any further extension of the law in this regard. An examination of the statutes of other states discloses a great variety of legislative policy—some statutes going so far as to save every legacy from lapse where the legatee predeceases the testator. But statutes such as the present are really canons of construction, intended to carry out an assumed testamentary intent when it is not expressed, and there is great danger of carrying too far rules which import into a written will a meaning which is more or less artificial.

(*c*) Unless a contrary intention shall appear by the will, such real or personal estate or interests therein as shall be comprised or intended to be comprised in any devise or bequest in such will contained, which shall fail or be void by reason of the death of the devisee or legatee in the lifetime of the testator, or by reason of such devise or bequest being contrary to law or otherwise incapable of taking effect, or which shall be revoked by the testator, shall be included in the residuary devise or bequest, if any, contained in such will. In any case where such devise or bequest, which shall fail or be void or shall be revoked as aforesaid, shall be contained in the residuary clause of such will, it shall pass to and be divided among the other residuary devisees or legatees, if any there be, in proportion to their respective interests in such residue.

NOTE.—This is Section 2 of the Act of June 4, 1879, P. L. 88, 4 Purd. 5145, amended so as to make it plain that it applies to personal as well as real estate, by including revoked devises and bequests, and by the addition of the last sentence.

This, like the other sections of the Act of 1879, was founded on the English Statute of 7 William IV and 1 Vict., Chapter 26.

According to the present law, residuary gifts which are void or fail by lapse pass to the next of kin or heirs and not to the other residuary legatees or devisees. The supreme court in Gray's Estate, 147 Pa. 67, 75, criticized this rule as wrong in principle and subversive of the great canon of construction, viz., the carrying out of the intent of the testator. In Gorgas's Estate, 166 Pa. 269, the rule was followed in a case where it was apparent from the language of the will that the testatrix intended not to give the next of kin any interest in her estate. And in Waln's Estate, 156 Pa. 194, the rule was applied in the case of a revocation of a residuary gift, Mr. Justice Mitchell repeating his criticism made in Gray's Estate. The Commissioners therefore recommend the abolition of the common law rule in accordance with the views expressed by the supreme court.

SECTION 16 (*a*) Whenever in any will a bequest or devise shall be made to the child or children of the

testator, without naming such child or children, such bequest or devise shall be construed to include any adopted child or children of the testator, unless a contrary intention shall appear by the will.

NOTE.—This is a new clause, introduced in conformity to the provisions of the new Intestate Act relating to inheritance by adopted children.

(*b*) Whenever in any will a bequest or devise shall be made to the child or children of any person other than the testator, without naming such child or children, such bequest or devise shall be construed to include any adopted child or children of such other person who were adopted before the date of the will, unless a contrary intention shall appear by the will.

NOTE.—This clause is also new. It is limited to the case of children adopted before the date of the will since it is a statutory canon of construction referable to the time when the testator makes his will. An extension to include children adopted after the date of the will would tend to defeat the intention of the testator.

SECTION 17. All pecuniary legacies contained in any will shall be charged upon and payable out of any real estate not specifically devised, where the personal estate is insufficient for their payment, or where the personal estate though originally sufficient has been wasted or misapplied by the executor, unless a contrary intention shall appear by the will.

NOTE.—This section is new. The ordinary rule is that the personal estate is not merely the primary fund for the payment of legacies, but the only fund applicable thereto, unless they are made a charge upon the real estate either by express terms or by clear implication. The Commissioners are of opinion that the real estate not specifically devised should be assets for the payment of pecuniary legacies unless a contrary intention appears from the will. This change is in accordance with several others suggested by the Commissioners, which tend to the establishment of uniformity in the descent and distribu-

tion of realty and personalty, both being considered as forms of property.

Many testators are unaware of the distinctions made by the law in this respect, which depend for the most part upon historical reasons that at the present day have lost their original significance; and such testators, when they bequeath legacies of sums of money, will naturally expect them to be paid even if their personal estates should prove insufficient. The personal estate will continue as before to be the primary fund for the payment of pecuniary legacies, the section of the act now recommended charging their payment on real estate not specifically devised unless a contrary intention appears, thus merely changing the presumption of the testator's intention.

In Maryland, a similar change was effected by Chapter 438 of the Laws of 1894.

The provision applicable to the case of a devastavit of the personal estate is believed to express the law as it now stands where legacies are charged on land by the will: Cook *vs.* Petty, 108 Pa. 138, and is included by way of precaution.

Section 18. Unless the testator shall otherwise direct by his will, the devisee of real estate, which is subject to mortgage, shall take subject thereto and shall not be entitled to exoneration out of the other estate of the testator, real or personal, and this whether the mortgage was created by the testator or by a previous owner or owners, and notwithstanding any general direction by the testator that his debts be paid.

Note.—This is a new section, intended to remove the existing distinction between mortgages made by the testator and those created by previous owners: Hirst's Appeal, 92 Pa. 491; Stuard's Estate, 17 Phila. 498; Burton's Estate, 15 Pa. C. C. 367. The distinction is a very technical one, not based on any presumed intention of the testator, but simply on the ground that the personal estate is still the primary fund for the payment of debts, as at one time it was the only asset. This historical justification of the rule has long been outgrown; and the change here recommended is in accord with the English Statutes of 17 and 18 Vict., Chapter 113; 30 and 31 Vict., Chapter 69; and 40 and 41 Vict., Chapter 34, known as the Locke King Acts. Those statutes contain further provisions, which the Commissioners have not included, considering them either unnecessary or inapplicable in this State.

Section 19. All income whatsoever, devised or bequeathed by any will so as to be free from liability for the debts, contracts or engagements of the beneficiary, or so as not to be subject to execution, attachment sur judgment, sequestration or other process, shall notwithstanding such testamentary provisions be subject to and liable for the support and maintenance of the wife and minor children of the beneficiary and for the value of necessaries furnished to them or any of them, where said beneficiary has refused or neglected to provide suitably for them, and all of the income of said beneficiary shall be subject to all legal process issued by any court of this commonwealth having jurisdiction in the premises in order to enforce such liability of said beneficiary.

Note.—This is a new section. A similar provision as to orders for support appears in the Act of April 15, 1913, P. L. 72, 5 Purd, 5919, amending Section 2 of the Act of March 5, 1907, P. L. 6.

The Commissioners have been impressed with the evil arising from the abuse of the doctrine of spendthrift trusts in this commonwealth. The decisions of the courts hold it legal for a testator in disposing of his own property to bequeath it in trust so that it shall not be liable for the debts of the beneficiary; but it is believed that this protection should not be accorded to prevent the application of the income to the support and maintenance of the family of the beneficiary, and enable him to escape his marital and parental duties.

Since the present act is to apply only to the estates of persons dying after its approval, this section does not fall within the opinion in Com. *vs.* Thomas, No. 407, Oct. Term, 1915, handed down by the Superior Court, December 18, 1916, holding the Act of 1913 invalid as to the estates of testators dying before the date of that act.

Section 20 (*a*) No will in writing concerning any real estate shall be repealed nor shall any devise or directions therein be altered otherwise than by some other will or

codicil in writing, or other writing declaring the same, executed and proved in the manner hereinbefore provided, or by burning, cancelling, obliterating or destroying the same by the testator himself, or by someone in his presence, and by his express direction.

NOTE.—This is Section 13 of the Act of April 8, 1833, P. L. 249, 4 Purd. 5130–5, which was founded on Section 6 of the Act of 1705, 1 Sm. L. 33, that section, however, relating to personal estate only.

(*b*) No will in writing concerning any personal estate shall be repealed, nor shall any bequest or direction therein be altered, otherwise than as hereinbefore provided in the case of real estate, except by a nuncupative will, made under the circumstances set forth in Section 4 of this Act, and also committed to writing in the lifetime of the testator, and after the writing thereof, read to or by him, and allowed by him, and proved to be so done by two or more witnesses.

NOTE.—This is Section 14 of the Act of 1833, 4 Purd. 5135, which made no change in the law as it existed under the Act of 1705, 1 Sm. L. 33.

SECTION 21. When any person, male or female, shall make a last will and testament and afterward shall marry or shall have a child or children not provided for in such will, and shall die, leaving a surviving spouse and such child or children, or either a surviving spouse or such child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the surviving spouse, or child or children born after the making of the will, shall be deemed and construed to die intestate; and such surviving spouse, child or children, shall be entitled to such purparts, shares and dividends of the estate, real and personal, of the deceased, as if such person had actually died without any will.

NOTE.—This is Section 15 of the Act of 1833, 4 Purd. 5135–7, modified so as to make the law the same with regard to women as it is with regard to men. This in-

volves the repeal of Section 16 of the Act of 1833, 4 Purd. 5137, relating to wills of single women. In the fourth and fifth lines, "such" has been inserted before "child;" and in the ninth line, "born after the making of the will" has been substituted for "afterborn."

Section 15 of the Act of 1833 was founded on Section 23 of the Act of April 19, 1794, 3 Sm. L. 143.

The history of our legislation upon the subject is reviewed by Judge Penrose in Fidelity Trust Company's Appeal, 121 Pa. 1; and in Owens *vs.* Haines, 199 Pa. 137, it was decided that the will of a woman was revoked *pro tanto* under the Act of 1833 by the subsequent birth of issue. To this extent, the section now reported is merely declaratory of the existing law; but the Commissioners in making its language general without distinction of sex also recommend for repeal Section 16 of the Act of 1833, 4 Purd. 5137, which provides that a will executed by a single woman shall be deemed revoked by her subsequent marriage. This is in accordance with the views of the Commissioners as expressed in this new Wills Act, as well as in the new Intestate Act, that the property rights of husband and wife should be the same. The old law required, in case of a testator, that both marriage and birth of issue should take place in order to effect a revocation of the will, while a woman's will was revoked by marriage alone, because of the merger of her legal identity in that of her husband. In Pennsylvania, the effect of the legislation was to make either marriage or the birth of children unprovided for operate as a revocation *pro tanto* of the will of the testator, while marriage annulled the will of a woman, though birth of children unprovided for revoked it only *pro tanto*. In some other States, and in England by the Statute of 7 William IV and 1 Vict., Chapter 26, Section 18, the law has been made uniform by giving this effect of absolute revocation to the mere marriage of the testator as well as to the marriage of a testatrix, a change that does not appear advisable, for the purpose of the doctrine of implied revocation by such a change of circumstances is only to protect the rights of those persons who as spouse or children afterward come into being. This object is accomplished by providing in every case for a revocation so far as such persons are concerned, and it is not necessary to annul the entire will.

SECTION 22. No person who shall be finally adjudged guilty, either as principal or accessory, of murder of the first or second degree, shall be entitled to take any part of the real or personal estate of the person killed, as devisee or legatee or otherwise under the will of such person.

NOTE.—This is a new section, corresponding to Section 23 of the new Intestate Act. See the note to that section.

SECTION 23 (*a*) When any person shall die testate leaving a surviving spouse, who shall elect to take against the will, such surviving spouse shall be entitled to such interests in the real and personal estate of the deceased spouse as he or she would have been entitled to had the testator died intestate: *Provided*, That nothing herein contained shall affect the right or power of a married woman, by virtue of any authority or appointment contained in any deed or will, to bequeath or devise any property held in trust for her sole and separate use.

NOTE.—This is a new section, framed to make the rights of husband and wife the same in electing to take against a will. The proviso is copied from Section 1 of the Act of May 4, 1855, P. L. 430, 3 Purd. 2460.

The adoption of this section involves the repeal of Section 11 of the Act of 1833, 1 Purd. 1275–6; Section 11 of the Act of April 11, 1848, P. L. 537, 1 Purd. 1276–7; Section 1 of the Act of May 4, 1855, *supra;* and Section 1 of the Act of April 20, 1869, P. L. 77, 1 Purd. 1278.

(*b*) A surviving spouse electing to take under or against the will of the decedent shall, in all cases, manifest the election by a writing signed by him or her, duly acknowledged before an officer authorized by law to take the acknowledgment of deeds, and delivered to the executor or administrator of the estate of such decedent, within two years after the issuance of letters testamentary or of administration. Neglect or refusal or failure to deliver such writing within said period shall be deemed an election to take under the will.

NOTE.—This is founded on Section 1 of the Act of April 21, 1911, P. L. 79, 7 Purd. 7766. The two year limitation is new, the provision that failure to elect shall be deemed

an election to take under the will being similar to the provision in Section 35 of the Act of 1832, which is embodied in clause (*d*) of this section.

(*c*) No payment from the estate of such decedent, except the exemption allowed by law to the widow, shall be required to be made to any surviving spouse unless his or her election shall have been first duly executed, acknowledged and delivered, as provided in clause (*b*) of this section.

NOTE.—This is Section 2 of the Act of April 21, 1911, P. L. 79, 7 Purd. 7766, changed by inserting the provision as to widow's exemption, and the words "required to be."

(*d*) The orphans' court, on the application of any person interested in the estate of a decedent, may issue a citation, at any time after six months from the death of the testator, to the surviving spouse of the testator, to appear at a certain time not less than one month thereafter, in the said court, to make his or her election to take under or against the will, which election shall be filed of record, and shall be conclusive. If the surviving spouse shall neglect or refuse to appear on such citation, then upon due proof being made to the court of the service thereof, the said neglect or refusal shall be deemed an election to take under the will, and the decree of the court to that effect shall be conclusive.

NOTE.—This is founded on Section 35 of the Act of March 29, 1832, P. L. 200, 1 Purd. 1277–8. The changes are the extension of the section to husband as well as wife, and the shortening of the period from twelve to six months, in harmony with the reduction of the period for the filing of the account. Some changes in phraseology have been made with a view to clearness.

(*e*) The election by a surviving spouse, or a certified copy of the final decree of any orphans' court, in cases where there shall have been an election in accordance with clause (*d*) hereof, or a neglect or refusal to elect within the time prescribed by the order of the said court, shall,

at the cost of the estate, be recorded by the personal representative of the decedent, in the office for the recording of deeds of the county where the decedent's will is probated, in the deed book, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the name of the surviving spouse, and shall be registered in the survey bureau, or with the proper authorities empowered to keep a register of real estate, if any there be, in said county. The charges for recording and registering shall be the same as are provided by law for similar services. The election, or decree of the court, or a certified copy of either, may also be recorded in any office for the recording of deeds within this commonwealth, with the same effect as if a duly signed and acknowledged declaration to the effect stated therein had been made by the person authorized to elect, and at his or her request recorded in said office according to law. After the said election shall have been recorded in the office for the recording of deeds as aforesaid, the said election, at the cost of the estate, shall be filed in the office of the clerk of the orphans' court and a record made of such filing by the said clerk.

NOTE.—This is Section 3 of the Act of April 21, 1911, P. L. 79, 7 Purd. 7766, with some changes in phraseology, the substitution of the clerk of the orphans' court for the register of wills, and the insertion of the provisions as to registration and as to charges for recording and registering.

SECTION 24. Nothing in this act contained shall be construed to apply to the disposition of personal estate by a testator whose domicile, at the time of his death, was out of this commonwealth.

NOTE.—This is Section 17 of the Act of 1833, 4 Purd. 5128, modified so as to conform to the language of Section 25 of the new Intestate Act.

SECTION 25. This act shall be known and may be cited as the Wills Act of 1917.

SECTION 26. This act shall take effect on the thirty-first day of December, 1917, and shall apply to the wills of all persons dying on or after said day. As to the wills of all persons dying before that day, the existing laws shall remain in full force and effect.

NOTE.—This section corresponds to Section 27 of the new Intestate Act. It supplies Section 18 of the Act of 1833, 4 Purd. 5129.

SECTION 27. The following acts and parts of acts of assembly are hereby repealed as respectively indicated, but so far only as relates to the estates, real and personal, of any person or persons dying on or after the thirty-first day of December, 1917. The repeal of the first section of an act shall not repeal the enacting clause.

Sections 3, 4, 6 and 7 of an act entitled "An Act concerning the probates of written and nuncupative wills, and for confirming devises of lands," passed in 1705, 1 Sm. L. 33, absolutely.

Section 23 of an act entitled "An Act directing the descent of intestates' real estates, and distribution of their personal estates, and for other purposes therein mentioned," passed April 19, 1794, 3 Sm. L. 143, absolutely.

Section 10 of an act entitled "An Act supplementary to the act, entitled 'An Act directing the descent of intestates real estates, and distribution of their personal estates, and for other purposes therein mentioned,'" passed April 4, 1797, 3 Sm. L. 296, absolutely.

Section 11 of an act entitled "An Act supplementary to the several acts of this commonwealth concerning partitions, and for other purposes therein mentioned," approved April 7, 1807, P. L. 155, absolutely.

An act entitled "An Act to prevent devises and legacies from lapsing in certain cases," approved March 19, 1810, P. L. 96, absolutely.

Section 1 of an act entitled "An Act relative to dower, and for other purposes," approved April 1, 1811, P. L. 198, absolutely.

Section 11 of an act entitled "An act relating to registers and registers' courts," approved March 15, 1832, P. L. 135, absolutely.

Section 35 of an act entitled "An act relating to orphans' courts," approved March 29, 1832, P. L. 190, absolutely.

An act entitled "An act relating to last wills and testaments," approved April 8, 1833, P. L. 249, absolutely.

Section 2 of an act entitled "An act further to regulate proceedings in courts of justice, and for other purposes," approved May 6, 1844, P. L. 564, absolutely.

An act entitled "A supplement to an act relating to last wills and testaments, passed the eighth day of April, eighteen hundred and thirty-three," approved January 27, 1848, P. L. 16, absolutely.

Sections 7 and 11 of an act entitled "A supplement to an act, entitled 'An act relative to the LeRaysville Phalanx,' passed March, Anno Domini one thousand eight hundred and forty-seven, and relative to obligors and obligees, to secure the right of married women, in relation to defalcation, and to extend the boundaries of the borough of Ligonier," approved April 11, 1848, P. L. 536, absolutely.

Section 11 of an act entitled "An act relating to corporations and to estates held for corporate, religious and charitable uses," approved April 26,1855, P. L. 328, in so far as it relates to estates, real or personal, bequeathed or devised.

Section 1 of an act entitled "An Act to amend certain defects of the law for the more just and safe transmission and secure enjoyment of real and personal estate," approved April 27, 1855, P. L. 368, in so far as it relates to devises.

Sections 1 and 6 of an act entitled "An act relating to certain duties and rights of husband and wife, and parents and children," approved May 4, 1855, P. L. 430, absolutely.

Section 1 of an act entitled "An act relating to dowers," approved April 20, 1869, P. L. 77, absolutely.

An act entitled "A supplement to an act relating to last wills and testaments, approved the eighth day of April, one thousand eight hundred and thirty-three, providing for the time from which wills shall speak and take effect, for the vesting of lapsed or void devises of real estate in the residuary devisee, and for the execution of powers over real and personal estate by the person in whom such powers are vested," approved June 4, 1879, P. L. 88, absolutely.

An act entitled "An act to enable mothers in certain cases to appoint testamentary guardians," approved June 10, 1881, P. L. 96, absolutely.

An act entitled "An act to enable mothers, in certain cases, to appoint testamentary guardians, being a supplement to an act, bearing the same title, approved June tenth, one thousand eight hundred and eighty-one, and also a supplement to an act, entitled 'An act relating to certain duties and rights of husband and wife, and parents and children,' approved May fourth, one thousand eight hundred and fifty-five," approved May 25, 1887, P. L. 264, absolutely.

Section 5 of an act entitled "An act relating to husband and wife, enlarging her capacity to acquire and dispose of property, to sue and be sued, and to make a last will, and enabling them to sue and to testify against each other in certain cases," approved June 8, 1893, P. L. 344, absolutely.

An act entitled "An act declaring the construction of words in a deed, will or other instrument importing a failure of issue," approved July 9, 1897, P. L. 213, in so far as it relates to devises or bequests of real or personal estate.

An act entitled "An act to amend section two of an act, entitled ' An act further to regulate proceedings in courts of justice, and for other purposes,' approved the sixth day of May, Anno Domini one thousand eight hundred and forty-four, relating to devises and legacies to brothers or sisters, or the children of brothers or sisters of any testator, and preventing the lapse thereof in the

case of the death of such devisee or legatee during the lifetime of the testator," approved July 12, 1897, P. L. 256, absolutely.

An act entitled "An act relating to elections by surviving husbands or wives to take under or against the wills of decedents; to the recording thereof, and of final decrees, where parties have failed or refused to elect when required so to do; and forbidding payments to such parties until they have made and filed their election," approved April 21, 1911, P. L. 79, absolutely.

An act entitled "An act to amend section eleven of an act, entitled 'An act relating to corporations and to estates held for corporate, religious, and charitable uses,' approved the twenty-sixth day of April, one thousand eight hundred and fifty-five," approved June 7, 1911, P. L. 702, in so far as it relates to estates, real or personal, bequeathed or devised.

An act entitled "An act to amend an act approved the eighth day of April, one thousand eight hundred thirty-three, entitled 'An act relating to last wills and testaments,' by conferring the same rights upon the mother as upon the father," approved April 15, 1915, P. L. 124, absolutely.

An act entitled "An act to amend an act, approved the tenth day of June, one thousand eight hundred eighty-one, entitled 'An act to enable mothers in certain cases to appoint testamentary guardians,' by extending certain rights to mothers," approved April 21, 1915, P. L. 145, absolutely.

All other acts of assembly, or parts thereof, that are in any way in conflict or inconsistent with this act, or any part thereof, are hereby repealed, so far as relates to the estates, real and personal, of any person or persons dying on or after the thirty-first day of December, 1917.

FIDUCIARIES ACT.

TABLE OF CONTENTS.

PAGE

SECTION 1. Definition of "fiduciary" 93

SECTION 2. Granting of letters testamentary and of administration.. 94

(*a*) Jurisdiction of register 94

(*b*) Letters not to be granted after twenty-one years except on order of court 94

(*c*) Who entitled to letters of administration 95

(*d*) Petition for letters 96

SECTION 3. Letters of administration *c. t. a.* and *d. b. n.* 96

(*a*) Granting of letters *c. t. a.* 96

(*b*) Granting of letters *d. b. n. c. t. a.* 97

(*c*) Granting of letters *d. b. n.* 97

(*d*) Powers of executors extended to administrators *c. t. a.* ... 98

(*e*) Powers of administrators *d. b. n.* 98

SECTION 4. Granting of letters durante minoritate, durante absentia, and pendente lite 99

SECTION 5. Acts of administrator or executor not to be impeached although will, or later will, be discovered 100

SECTION 6. Presumed decedents 100

(*a*) Petition and advertisement 100

(*b*) Petition and advertisement as to ancillary letters 101

(*c*) Hearing by court or by examiner and master; competency of witnesses 102

(*d*) Decree that presumption of death is made out, and advertisement thereof 103

(*e*) Confirmation or vacation of decree 103

(*f*) Effect as to real estate; title of purchaser; bond by party selling or conveying 104

(*g*) Administration and distribution of estate 105

(*h*) Refunding bonds; appointment of trustee on refusal, neglect or inability to give bond 106

(*i*) Vacation of decree; effect as to acts done 107

(*j*) Intervention in actions by person erroneously supposed to be dead; opening of judgments 108

(*k*) Procedure where will, or later will, is produced after letters have been granted 109

(*l*) Citation by register to parties interested 110

PAGE

(*m*) Probate of will, or later will, revocation of letters and granting of new letters ... 110
(*n*) Payment of costs ... 111
SECTION 7. Oaths of executors and administrators ... 111
(*a*) Form of oath ... 111
(*b*) Oath by officer of corporation ... 112
SECTION 8. Bonds of administrators and executors ... 112
(*a*) Form of bond of administrator ... 112
(*b*) Bond of administrator *c. t. a* ... 113
(*c*) Form of bond of non-resident executor ... 114
(*d*) Grant of letters without bond; liability of register of wills 115
(*e*) Bond of executor or administrator of deceased fiduciary. 115
(*f*) Exceptions to bonds ... 116
SECTION 9. Bonds of fiduciaries in general ... 117
(*a*) Suits on bonds ... 117
(*b*) Reduction of bonds ... 118
(*c*) Expense of obtaining bond of corporation ... 118
SECTION 10. Advertisement of granting of letters ... 119
SECTION 11. Inventory and appraisement ... 119
(*a*) Inventory to be filed in thirty days ... 119
(*b*) Procedure to compel filing of inventory ... 120
(*c*) Bonds, notes, other evidences of debt, all claims and demands for money and other personal property to be included in inventory ... 120
(*d*) Debt due by executor not released by appointment, and to be included in inventory ... 121
(*e*) Rents due to tenant for life to be included in inventory .. 121
(*f*) Arrearages of rent-charge, or other rent or reservation to be included in inventory ... 121
(*g*) Estates in land for life of another to be included in inventory ... 122
(*h*) After-discovered property to be inventoried ... 122
(*i*) Appraisement; oath of appraisers ... 123
(*j*) Notice of appraisement; return ... 123
(*k*) Compensation of appraisers ... 124
SECTION 12. Widow's and children's exemption ... 124
(*a*) Claim and appraisement or setting apart; appointment of appraisers by court ... 124
(*b*) Liens for purchase money of real estate not to be affected 126
(*c*) Oath and compensation of appraisers ... 127
(*d*) Advertisement or notice; confirmation and filing of appraisement; payment of expenses of advertisement or notice ... 127
(*e*) Exemption to minor children ... 128
1. Duty of executor or administrator to act ... 128

PAGE

2. Guardian, or executor or administrator, to select property to be set aside 128
(f) Where estate does not exceed five hundred dollars 128
(g) Claim of exemption out of real estate appraised at more than amount of claim; appraisement and confirmation; payment of excess; sale on failure to pay 129
(h) Title to vest on payment of excess; distribution of proceeds of sale 130
(i) Widow or children entitled to rents, income, interest and dividends from death of decedent; deduction of proportionate part upon failure to pay excess value of real estate 130
(j) Procedure where real estate lies in another county or is divided by a county line 131
(k) Recording and registry of decree confirming appraisement of real estate 132

SECTION 13. Payment of debts of decedent 132
(a) Order of payment 132
(b) Payment not to be compelled within six months 132

SECTION 14. Rents of real estate to be assets for payment of debts when personal estate insufficient; collection by executor or administrator 133

SECTION 15. Lien of debts of decedent 134
(a) Lien limited to one year unless action brought, indexed, and duly prosecuted to judgment 134
(b) Debts not due within one year; procedure to acquire and continue lien 135
(c) Provisions of clause (a) to be retroactive; saving clause .. 136
(d) Indexing by prothonotary; filing certified copy of praecipe in other counties 136
(e) Executions on judgments obtained against executors or administrators; scire facias to surviving spouse, heirs, etc. 137
(f) Judgments not liens at death to be treated as debts not of record; method of continuing lien 137
(g) Judgments which are liens at death to be liens for five years from death; revival 138
(h) Effect of section as to mortgages and bonds secured thereby 139
(i) Executions on judgments obtained in decedent's lifetime 139
(j) Distribution of proceeds of sheriff's sale 140
(k) Stay of execution until application to orphans' court for sale of real estate 140

PAGE

(*l*) Order on executors or administrators to apply to orphans' court 140

SECTION 16. Sales and mortgages of real estate for the payment of debts of decedents 141
(*a*) Duty of executor or administrator to sell real estate where personal estate and rents are insufficient to pay debts. 141
(*b*) Power of orphans' court to authorize sale or mortgage of real estate 141
1. On application of executor or administrator 141
2. On application of executor or administrator or of creditor 142
(*c*) Inventory, statement of real estate, and account of debts to be filed 143
(*d*) Refunding mortgages 143
(*e*) Appointment of master 144
(*f*) Bond of person carrying out decree 144
(*g*) Public notice of sale 144
(*h*) Securing unpaid purchase money 145
(*i*) Acknowledgment of deeds and mortgages 145
(*j*) Removal or incapacity of fiduciary 146
1. Before conveyance or mortgage 146
2. Where there are co-fiduciaries 147
3. Before sale 148
4. Effect of sale, deed or mortgage 148
5. Revocation of letters or removal of fiduciary after sale 149
6. Irregularity or defect in appointment 149
(*k*) Conveyance or mortgage where fiduciary is purchaser or mortgagee 150
(*l*) Real estate in other counties 150
1. Real estate in county other than that the orphans' court of which has jurisdiction of accounts 150
2. Real estate divided by county line 151
(*m*) Private sales 152
1. When authorized 152
2. Public notice 153
3. Objections to sale 154
(*n*) Return and confirmation 155
(*o*) Discharge of liens 155
(*p*) Purchaser not bound to see to application of purchase money 156

SECTION 17. Proceedings to relieve real estate from lien of debts 156
(*a*) Petition 156
(*b*) Hearing by court or by master; notice 156
(*c*) Decree; bonds by persons entitled to real estate 157

PAGE

SECTION 18. Contracts of decedents for sale or purchase of real estate 157
(a) Petition, notice, hearing and decree of specific performance ... 157
(b) Remedy in orphans' court exclusive ... 158
(c) Indexing of petition in judgment index ... 159
(d) Execution and effect of deed; decree for payment by representatives of deceased vendee ... 160
(e) Enforcement of parol contracts ... 160
(f) Execution of deed where grantee is executor or administrator ... 161

SECTION 19. Notice of devise or bequest to corporation ... 162

SECTION 20. Abatement of legacies ... 162

SECTION 21. When legacies shall be payable; interest on legacies ... 162

SECTION 22. Apportionment of income ... 164

SECTION 23. Security by one entitled to income of proceeds of sale of decedent's real estate, and by legatee for life, for term of years or other limited period, or on condition or contingency; appointment of trustee on refusal, neglect or inability to enter security ... 164

SECTION 24. Remedy for collection of all legacies to be exclusively in the orphans' court ... 166

SECTION 25. Procedure to enforce payment of legacies charged on land 167
(a) Petition, notice, decree for payment; sale and distribution of proceeds; decree to enforce payment of interest 167
(b) Procedure where land lies in another county or is divided by a county line ... 169
(c) Bond by legatee or other person entitled to benefit of decree for payment ... 170

SECTION 26. Discharge of residuary estate from annuities or legacies payable in future ... 170
(a) Petition ... 170
(b) Citation; hearing; appointment of master ... 171
(c) Decree directing setting apart or investing of so much of residuary estate as will secure payment of annuities or legacies ... 172
(d) Discharge of remaining estate; appeals ... 172
(e) Custody of portion of estate set apart; accounts; surplus income ... 173
(f) Reduction of fund set apart ... 174
(g) Rights to ultimate enjoyment of residuary estate set apart not to be affected ... 175

SECTION 27. Discharge of real estate from lien of legacies and other charges ... 175

PAGE

(*a*) Where persons to whom payment is due cannot be found 175
1. Jurisdiction; petition and notice 175
2. Hearing; ascertainment of amount of charge; payment into court; recording of decree 176
(*b*) Where charge has been paid or is presumed to be paid.. 177
1. Jurisdiction 177
2. Petition 178
3. Citation 178
4. Hearing; decree; recording of decree 179
(*c*) Cases not provided for in clauses (*a*) and (*b*) 179
(*d*) Distribution of moneys paid into court 180
(*e*) Payment of costs 181
(*f*) Appeals 181
SECTION 28. Powers of executors as to real estate 181
(*a*) Mere authority to sell the same as a devise to sell 181
(*b*) Private sales, conveyances or leases authorized 182
(*c*) Powers not given to any person by name or description deemed to be given to executors, but to be exercised under control of orphans' court 182
(*d*) Powers of surviving, acting or remaining executors or administrators *c. t. a.* as to real estate 182
SECTION 29. Fiduciaries may make conveyances through attorneys.. 183
SECTION 30. Purchasers of real estate from executors or trustees not bound to see to the application of the purchase money 184
SECTION 31. Leases of real estate by testamentary trustees and guardians 185
SECTION 32. Elections by guardians or trustees 186
(*a*) Election to take real estate in lieu of proceeds 186
(*b*) Election to take money instead of real estate in which it is directed to be invested 186
(*c*) Validation of previous elections 187
SECTION 33. Procedure where real estate is devised at an appraisement to be made, or to executor at a valuation 187
(*a*) Jurisdiction; petition 187
(*b*) Appointment of appraisers; notice 188
(*c*) Oath and compensation of appraisers 188
(*d*) Return and confirmation of appraisement; appeals 189
(*e*) Citation to accept or refuse; decree adjudging real estate to devisee or to other persons; recording and registry of decree 189
(*f*) Where real estate is devised to executor at a valuation.. 190
(*g*) Validation of previous decrees 191
SECTION 34. Designation of curtilage of building devised 191
(*a*) Jurisdiction; petition 191
(*b*) Appointment and compensation of commissioners 192

PAGE

(c) Notice of proceedings of commissioners; report; confirmation; recording and registry of decree; title of devisee. 192
(d) Payment of costs..... 193

SECTION 35. Abatement and survival of actions; substitution of executors and administrators; pleadings as to assets. 193
(a) Personal actions, except for slander and libel, not to abate 193
(b) Executors and administrators may sue and be sued in personal actions except for slander and libel..... 194
(c) Pending actions of ejectment to enforce payment of purchase money..... 195
(d) Executors or administrators may sue or distrain for arrearages of rent-charge or other rent or reservation, due to decedent..... 195
(e) Executors or administrators of life tenant may sue for proportion of rent due up to date of death..... 196
(f) Executors or administrators may be substituted in pending actions and may issue execution on judgment in favor of decedent..... 196
(g) Scire facias to bring in executors or administrators of deceased party; continuance..... 197
(h) Service of scire facias when executors or administrators reside without the county..... 198
(i) Actions not to abate by death, dismissal, removal, resignation or renunciation of fiduciaries..... 198
(j) Failure to plead any matter relative to assets, or to reply thereto, not to be deemed an admission..... 200
(k) Abatement of action by failure to take out letters in deceased plaintiff's estate..... 200

SECTION 36. Statute of limitations to run against debt falling due to estate of decedent after his death although letters have not been granted..... 201

SECTION 37. Suits against fiduciaries who do not reside in county the court of which has jurisdiction of their accounts..... 201

SECTION 38. Suits by fiduciaries against co-fiduciary..... 202

SECTION 39. Revival of judgment against executor or administrator of judgment creditor..... 202

SECTION 40. Compromise by fiduciaries of claims against estate or questions as to will or distribution..... 203

SECTION 41. Investments by fiduciaries..... 204
(a) Legal investments..... 204
1. Investments in debt of United States, Commonwealth of Pennsylvania or municipalities of the commonwealth, or on real securities or in ground rents within the commonwealth..... 204

PAGE

2. Investments in other real estate within the commonwealth or in debts of other states or counties or cities thereof 205
3. Fiduciary not liable for loss on such investments .. 206
(b) Expense of procuring guaranty of investments 206

SECTION 42. Organization of corporation to carry on decedent's business 207
(a) Property of estate may be contributed in return for stock, whether or not the will authorizes carrying on business 207
(b) Approval of orphans' court necessary; procedure 207
(c) How stock shall be held; voting stock 208

SECTION 43. Voting of stock in corporations by fiduciaries 208

SECTION 44. Liability of executors and administrators for interest .. 209
(a) When liable 209
(b) Rate of interest 210

SECTION 45. Same person shall not receive commissions as executor and trustee 210

SECTION 46. Accounts of executors, administrators and trustees 211
(a) Accounts of executors and administrators to be filed in six months; executor or administrator may be cited to account at end of six months 211
(b) Orphans' courts may appoint examiners to make examinations of assets in hands of fiduciaries 211
(c) Claimants who have notified executors, administrators or trustees to be entitled to receive actual notice of filing of accounts 212
(d) Register's duties as to transmission and advertising of accounts; expenses 213
(e) Orphans' court may require additional notice where parties in interest reside out of the state or where other circumstances render further notice expedient .. 214
(f) Accounts not to be confirmed unless it appears that notice has been given 214
(g) Where trustees' accounts shall be filed; exclusive jurisdiction of orphans' court 215
(h) Triennial accounts of trustees 216
(i) Notice of filing of trustees' accounts 216

SECTION 47. Audits 217
(a) Rules of courts as to publication of notices of audits 217
(b) Audits by court in counties having separate orphans' court 217
(c) Audits by court or auditors in counties not having separate orphans' court 217

PAGE

SECTION 48. Review of accounts, adjudications and auditors' reports. 218

SECTION 49. Distribution of estates. 219
(a) Distribution not to be compelled within six months; after six months, distribution may be ordered on petition of creditor or any person interested. 219
(b) Distribution without audit of account at risk of executors or administrators; distribution under order of court to protect executors or administrators, and to be without refunding bonds. 220
(c) Distribution of estates not exceeding three hundred dollars. 221
(d) Creditor failing to present claim at audit not entitled to share in distribution. 221
(e) Distribution in kind. 222
1. Court may direct distribution of unconverted securities. 222
2. Duty of fiduciary to whom such distribution is made; application to court for authority to sell. 222
(f) Distribution by employer of wages due decedent not exceeding seventy-five dollars. 223

SECTION 50. Refunding bonds. 224
(a) Fiduciary who has given bond may require bonds from persons to whom he makes payments. 224
(b) Limitation of actions on refunding bonds. 224

SECTION 51. Transcripts of balances due by fiduciaries. 225
(a) Filing transcripts in common pleas and effect thereof: executions. 225
(b) Satisfaction and discharge of judgments on transcripts. 227

SECTION 52. Discharge of fiduciaries and sureties. 228
(a) Conditions of discharge. 228
(b) Discharge of one or more of joint fiduciaries. 229

SECTION 53. Removal of fiduciaries. 229
(a) Grounds for removal. 229
1. Waste or mismanagement; probable insolvency; failure to file inventory or account. 229
2. Lunacy, drunkenness or weak-mindedness. 229
3. Sickness or physical or mental incapacity. 229
4. Removal from the state. 230
5. Mismanagement or misconduct by guardian. 230
6. Failure to pay over principal or income or to comply with any order of court. 230
7. Neglect or abuse of trust by trustee for religious, educational or charitable purposes. 230
8. Probable jeopardy of interests of estate. 230

PAGE

9. When all or a majority of cestuis que trust having life estate desire removal on any substantial ground ... 230
(*b*) Petition; citation; orders and decrees ... 231
(*c*) Summary removal in cases of emergency ... 232
(*d*) Decree removing one fiduciary not to affect co-fiduciaries ... 233
(*e*) Enforcement of orders and decrees; suits by succeeding fiduciary ... 233

SECTION 54. Requirement of security by executor or additional security by other fiduciary; proceedings by sureties to require counter security, for discharge of surety, or for removal of fiduciary ... 233
(*a*) Proceedings to require additional security ... 233
1. Decree; attachment ... 233
2. Removal on failure to comply with decree ... 235
(*b*) Proceeding by surety to compel giving of counter-security ... 235
(*c*) Proceeding by surety for discharge ... 236

SECTION 55. Requirement of statement of investments on ten days' notice; accounting; removal ... 237

SECTION 56. Appointments of trustees to fill vacancies ... 238
(*a*) Partial vacancy in testamentary trust ... 238
(*b*) Entire vacancy in testamentary trust ... 239
(*c*) Appointment of trustee where executor declines to act or is discharged; appointment of separate trustees for several parties ... 240
(*d*) Jurisdiction of orphans' court to be exclusive ... 240

SECTION 57. Non-resident fiduciaries; corporations of other states as fiduciaries ... 241
(*a*) Powers; appointment of non-residents and foreign corporations as fiduciaries ... 241
(*b*) Appointment of resident co-trustees ... 241

SECTION 58. Foreign fiduciaries ... 242
(*a*) Foreign executors, administrators and trustees ... 242
(*b*) Foreign guardians ... 243
(*c*) Powers of foreign fiduciaries in general; authentication of copies of wills or other authority ... 243
(*d*) Powers of foreign executors and trustees as to sale of real estate ... 245
(*e*) Revival of judgments by foreign executors and administrators ... 246
(*f*) Awards to foreign executors and administrators ... 246
(*g*) Powers of foreign guardians, trustees, committees and other fiduciaries as to removal of property ... 247

PAGE

1. Proof of appointment and qualification of fiduciary 247
2. Discharge of resident fiduciary ... 249

(*h*) Award to foreign trustee when all beneficiaries for a term of years or for life have removed from the state ... 250

SECTION 59. Guardians ... 251

(*a*) Power of orphans' court to appoint; effect of appointment ... 251

(*b*) Persons of same religious persuasion as parents to be preferred as guardians of the person ... 252

(*c*) Executor, administrator or trustee not to be appointed guardian ... 252

(*d*) Parent not to be appointed guardian; where estate is one hundred dollars or less award may be made to natural guardian or person maintaining minor ... 252

(*e*) Appointment of guardians of estates of minors residing out of the commonwealth ... 253

(*f*) Appointment of guardians for minors in service of United States, or whose appearance is physically impossible or unnecessarily expensive ... 253

(*g*) Bonds of guardians ... 254

(*h*) Inventory to be filed by guardian ... 255

(*i*) Allowance for support and education of minor ... 255

(*j*) Accounts of guardians ... 256

1. Triennial accounts ... 256
2. Guardian or next friend may petition to have account audited ... 256
3. Contents of petition ... 256
4. Notice of filing of account and petition ... 256
5. Audit of account; appointment of guardian ad litem; confirmation ... 256
6. Payment of costs ... 257
7. Appeals and rehearings ... 257
8. Final accounts ... 257

(*k*) Notice to guardian of proceeding affecting interests of minor; appointment of guardians ad litem ... 258

SECTION 60. Trustees durante absentia ... 259

(*a*) Petition and appointment ... 259

(*b*) Bond, inventory and accounts ... 259

(*c*) Duties of trustee when absent person returns or dies within seven years, or where letters testamentary or of administration are issued on the ground of his presumed death ... 260

SECTION 61. Immaterial variation from forms not to vitiate proceedings ... 261

SECTION 62. Short title section ... 261

SECTION 63. Repealer ... 261

AN ACT

Relating to the administration and distribution of the estates of decedents and of minors, and of trust estates; including the appointment, bonds, rights, powers, duties, liabilities, accounts, discharge and removal of executors, administrators, guardians and trustees, herein designated as fiduciaries; the administration and distribution of the estates of presumed decedents; widow's and children's exemptions; debts of decedents, rents of real estate as assets for payment thereof, the lien thereof, judgments and executions therefor, sales and mortgages of real estate for the payment thereof, and the discharge of real estate from the lien thereof; contracts of decedents for the sale or purchase of real estate; legacies, including legacies charged on land; the discharge of residuary estates and of real estate from the lien of legacies and other charges; the appraisement of real estate devised at a valuation; the ascertainment of the curtilage of dwelling houses or other buildings devised; the abatement and survival of actions and the substitution of executors and administrators therein, and suits against fiduciaries; investments by fiduciaries; the organization of corporations to carry on the business of decedents; the audit and review of accounts of fiduciaries; refunding bonds; transcripts to the court of common pleas of balances due by fiduciaries; the rights, powers and liabilities of non-resident and foreign fiduciaries; the appointment, bonds, rights, powers, duties and liabilities of trustees durante absentia; the recording and registration of decrees, reports and other proceedings, and the fees therefor; appeals in certain cases; and also generally dealing with the jurisdiction, powers and procedure of the orphans' court in all matters relating to fiduciaries concerned with the estates of decedents.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania

in General Assembly met, and it is hereby enacted by the authority of the same, That as used in this act, the term "fiduciary" shall include executors, administrators, guardians and trustees, whether domiciliary or ancillary, subject to the jurisdiction of the orphans' court of any county of this commonwealth.

NOTE.—This is suggested by Section 1 of the Act of May 3, 1915, P. L. 218, 6 Purd. 7038, which relates only to the reduction of bonds. It is inserted in the new act in order to avoid repeating in many places the words "executors, administrators, guardians and trustees."

SECTION 2 (*a*) Letters testamentary and of administration shall be grantable only by the register of wills of the county within which was the family or principal residence of the decedent, at the time of his decease; and if the decedent had no such residence in this commonwealth, then ancillary letters testamentary or of administration shall be grantable only by the register of the county where the principal part of the goods and estate of such decedent within this commonwealth shall be.

NOTE.—This is derived from the first part of Section 6 of the Act of March 15, 1832, P. L. 135, 1 Purd. 1074, which was new in that act.

The language as to a decedent having no residence in the commonwealth has been modified so as to show that it refers to the granting of ancillary letters. See Sayre's Exrs. *vs.* Helme's Exrs., 61 Pa. 299.

(*b*) No letters testamentary or of administration shall in any case be originally granted upon the estate of any decedent, after the expiration of twenty-one years from the day of his decease, except on the order of the orphans' court, upon due cause shown.

NOTE.—This is Section 21 of the Act of 1832, 1 Purd. 1075, which corresponded to the latter part of Section 20 of the Commissioners' Draft. The first part of that section of the draft provided that letters should not issue until the expiration of five days after the death.

The twenty-one year provision was new in the Act of 1832. The Commissioners remarked that it did not apply to cases where an administration commenced had become vacant. In Hanbest's Estate, 21 Pa. Super. Ct. 427, however, it is held that the word "originally" in the second line of the section is synonymous with "in the first instance," and that the section applies not only to cases in which no letters of administration have been previously granted, but also to cases in which prior letters have been issued.

The words "testamentary or" have been inserted, and "orphans' court" substituted for "register's court."

(*c*) Whenever letters of administration are by law necessary, the register having jurisdiction shall grant them in such form as the case shall require, to the widow, if any, of the decedent, or to such of his relations or kindred as by law may be entitled to the residue of his personal estate, or to a share or shares therein, after payment of his debts; or he may join with the widow in the administration, such relations or kindred, or such one or more of them, as he shall judge will best administer the estate, preferring always, of those so entitled, such as are in the nearest degree of consanguinity with the decedent, and also preferring males to females; and in case of the refusal or incompetency of every such person, to one or more of the principal creditors of the decedent applying therefor, or to any fit person at his discretion: *Provided*, That if such decedent was a married woman, her husband shall be entitled to the administration, in preference to all other persons: *And provided further*, That in all cases of an administration with a will annexed, where there is a general residue of the estate bequeathed, the right to administer shall belong to those having the right to such residue, and the administration in such case shall be granted, by the register, to such one or more of them as he shall judge will best administer the estate.

NOTE.—This is Section 22 of the Act of March 15, 1832, P. L. 135, 1 Purd. 1080, corresponding to Section 21 of the Commissioners' Draft. It was intended as an arrange-

ment and condensation of the material provisions of the Statute of 21 Henry VIII, c. 5, with the addition of a proviso, derived from Section 5 of the Act of March 21, 1772, 1 Sm. L. 389, giving the husband the right to administer, and a clause giving residuary legatees the right to letters with the will annexed.

(*d*) Every application to any register of wills for the issuance of letters testamentary or of administration shall be in the form of a petition, duly verified by affidavit, setting forth the residence and citizenship and the place, day and hour of death of the decedent, the estimated value of his property, real and personal, the location of his real property, and, in the case of an intestacy, the names and residences of the surviving spouse, if any, and of the next of kin of the intestate, together with an averment that the persons named are the surviving spouse and all the next of kin of the intestate.

NOTE.—This is a new clause, drafted in accordance with the existing practice in Philadelphia and Allegheny Counties and perhaps in others. As the practice is understood not to be uniform throughout the State, the Commissioners have considered it proper to recommend it as a general law. The provision as to the statement of citizenship of the decedent has been added to cover cases of alien decedents, where questions as to notice to consuls, etc., may arise.

This clause supplies Sections 1 and 2 of the Act of May 15, 1874, P. L. 194, 1 Purd. 1075, which provide that all persons applying for letters shall file an affidavit as to the day and hour of the death, which shall be filed by the register. Those sections are therefore recommended for repeal.

SECTION 3 (*a*) Whenever the executors named in any last will and testament shall all refuse or renounce the trust and execution thereof, the register having jurisdiction as aforesaid may receive the probate of such will, and grant letters of administration with it annexed, to the persons by law entitled thereto.

NOTE.—This is Section 18 of the Act of 1832, 1 Purd. 1074, which corresponded to Section 17 of the Commissioners' Draft, and was intended to provide "for cases of intestacy by the renunciation of the trust of execution by all the executors." The Commissioners referred to the Statute of 21 Henry VIII, c. 5, Section 3, Rob. Dig. 250, as mentioning this case.

(*b*) Whenever a sole executor, or the survivor of several executors, shall die, leaving goods or estate of his testator unadministered, the register having jurisdiction shall, notwithstanding such executor may have made his last will and testament, and appointed an executor or executors thereof, grant letters of administration of all such goods and estate, in the same manner as if such executor had died without having made any testament or last will; and the executor of such deceased executor shall in no case be deemed executor of the first testator.

NOTE.—This is Section 19 of the Act of March 15, 1832, P. L. 135, 1 Purd. 1074, which corresponded to Section 18 of the Commissioners' Draft.

By the common law, the trust of the sole executor might be transmitted to his executor, and the same was true as to the survivor of several executors. The Act of March 12, 1800, 3 Sm. L. 433, Section 3, enabled administrators with the will annexed to execute the powers conferred upon executors by will in relation to lands. The Commissioners remarked: "This act having thus provided for the cases in which the powers of the executor of an executor are most important, it is proposed by this section to abolish his powers altogether. * * * We will only add that convenience in the administration of the two estates and the security of creditors and others interested in different rights recommend the adoption of the section under consideration."

(*c*) In all cases where the administration of the estate of any decedent shall become vacant, by reason of death or of any decree of the orphans' court, or from any other cause, the register having jurisdiction shall, on proper proof being made of the fact, grant new letters, in such form as the case shall require, to the person or persons by law entitled thereto.

NOTE.—This is Section 20 of the Act of 1832, 1 Purd. 1075, which corresponded to Section 19 of the Commissioners' Draft, and was new in the Act of 1832. It is now changed by providing for vacancies caused by death or otherwise, and by substituting "proper proof being made of the fact" for "being certified thereof, under the seal of the said court."

(*d*) All and singular the powers, duties and liabilities of executors are hereby extended to administrators with a will annexed.

NOTE.—This is Section 67 of the Act of February 24, 1834, P. L. 73, 1 Purd. 1100, which was introduced in that act to avoid the necessity of particular provisions in the various sections. After "singular," the words "the provisions of this act relative to" have been omitted.

It seems unnecessary to re-enact Section 1 of the Act of February 7, 1814, P. L. 44, which provides:—

"All the powers and authorities vested in administrators with the will annexed, in case of death, refusal, renouncing or dismissal of the executor or executors, by the act to which this is supplementary, be and are hereby extended to, and vested in administrators with the will annexed, in those cases where no executor or executors shall have been appointed, to be exercised as fully as any executor or executors might have done if appointed."

(*e*) Administrators de bonis non, with or without a will annexed, shall have power to demand and recover from their predecessors in the administration, or their legal representatives, all moneys, goods and assets remaining in their hands due and belonging to the estate of the decedent, and to commence and prosecute actions upon promises made to such predecessors in their representative character, and to take and defend appeals and sue forth and defend writs of scire facias and writs of execution upon judgments, obtained by or in the name of the executors or administrators into whose place they may have come, and also to proceed with and perfect all unexecuted executions, which may have been issued thereon at the instance of such predecessors: *Provided*, That when any suit shall have been brought by an administrator de bonis non for the recovery of moneys,

goods or assets, remaining in the hands of his predecessors, or their legal representatives, before they shall have settled their final administration account, the court in which such action shall be brought shall have power to stay the proceedings therein, on the defendants' filing such an account in the register's office of the proper county within a reasonable time to be fixed by said court, until said account shall have been finally settled and confirmed; and on the production of a certified copy of said account, so settled and confirmed, the court in which such suit shall be pending is hereby authorized and required to render judgment for the balance which shall thereby appear to be due to either party.

NOTE.—This is Section 31 of the Act of 1834, 1 Purd. 1112, which corresponded to Section 32 of the Commissioners' Draft, except that the draft did not include the proviso. "Take and defend appeals" has been inserted and "of error" omitted. The provision as to time for filing the account is changed. The Act of 1834 makes it "twenty days previous to the term next succeeding that to which the writ was returnable." "Confirmed" has been substituted for "adjusted."

Section 32 of the draft considerably enlarged the provisions of the Statute of 17 Car. II, Chapter 8, Section 11, and was intended to remedy a defect in the law. The Commissioners referred to the decision in Allen *vs.* Irwin, 1 S. & R. 549, that an administrator *d.b.n.* could not maintain assumpsit against the administrators of a deceased executor.

SECTION 4. The register of wills having jurisdiction may, when the circumstances of the case require, grant to any fit person or persons letters of administration durante minoritate, durante absentia, or pendente lite, security to be entered as in other cases of administration.

NOTE.—This is a new section, giving express sanction to powers now exercised by registers as to letters durante absentia and pendente lite, and superseding Section 23 of the Act of March 15, 1832, P. L. 135, 1 Purd. 1083, which provides:—

"Whenever all the executors named in any last will and testament, or all the persons entitled as kindred to

the administration of any decedent's estate, shall happen to be under the age of twenty-one years, it shall be lawful for the register to grant administration as aforesaid to any other fit person or persons, subject nevertheless to be terminated at the instance of any of the said minors who shall have arrived at the full age of twenty-one years."

SECTION 5. All such acts of administration as would be in due course of law, in case of intestacy, if done in good faith and without notice of a will, and all such acts of any executor as would be in due course of law, if the will under which letters testamentary were issued were the last will of the testator, and if done in good faith and without notice of a later will, shall not be impeached, though a will, or a later will, should afterward be discovered and established.

NOTE.—This is Section 68 of the Act of 1834, 1 Purd. 1100, enlarged to include acts of an executor under a former will in case a later will is discovered. The Commissioners of 1830 remarked that this section was "in conformity with the obvious rules of equity and justice, and with the jurisprudence of some of our sister states."

SECTION 6 (*a*) Whenever, hereafter, any person shall be presumed to be dead, on account of absence for seven or more years from the place of his or her last domicile, whether the same be within this commonwealth, or in any other state, territory or possession of the United States, or in any foreign country, any person entitled under the last will and testament of such presumed decedent or under the intestate laws to any share in his or her estate within this commonwealth, or the escheator for the commonwealth, may present a petition to the orphans' court of the county of such person's last residence or, where the presumed decedent was a non-resident of this commonwealth, in the orphans' court of the county where the greater part of his property within this commonwealth may be situated, setting forth the facts which raise the presumption of death. The said court, if satisfied as to the person who would be entitled to letters testamentary or of

administration were the presumed decedent in fact dead, shall cause to be advertised, in a newspaper published in said county, once a week for four successive weeks, together with such other advertisement as the court, according to the circumstances of the case, shall deem expedient or advisable, the fact of such application, together with notice that on a day certain, which shall be at least two weeks after the last appearance of said advertisement, the court, or master appointed by the court for that purpose, will hear evidence concerning the alleged absence of the presumed decedent, and the circumstances and duration thereof.

NOTE.—This is a combination of Section 1 of the Act of June 24, 1885, P. L. 155, 1 Purd. 1075, and Section 1 of the Act of May 28, 1913, P. L. 369, 5 Purd. 5886.

The latter act is followed in providing for application in the first instance to the orphans' court. This seems to be the better practice, as there is no apparent reason for applying to the register and having him at once certify the matter to the court.

The section has been altered so as to include cases where the last domicile was outside the commonwealth. This is now covered, but as to ancillary letters only, by Section 9 of the Act of May 28, 1913, P. L. 373, 5 Purd. 5884, 5886.

The provisions have been extended to cases where the presumed decedent has left a will, which is produced in the first instance. The case of production of a will after letters of administration have been granted is covered by clause (*k*) of this section. A provision for additional advertisements has been inserted.

(*b*) Whenever, hereafter, letters of administration or letters testamentary shall have been granted in any other state, territory or possession of the United States, or in any foreign country, on the estate of a resident thereof, presumed to be dead, on account of absence for seven or more years from the place of his last domicile, it shall be lawful for the person or persons, or trust company, to whom such letters have been granted, to present a petition to the orphans' court of the county within this commonwealth in which all, or the greater portion, of

the estate of said presumed decedent may be found, accompanied by a complete exemplification of the record of the grant of such letters, praying for the grant of ancillary letters testamentary or of administration upon the estate of such presumed decedent, situate, owing or belonging to him within this commonwealth. The said court, if satisfied that the person or trust company proposed in such petition would be a fit person or company to whom such letters might be issued, shall cause publication to be made, in the manner and for the period as provided in clause (*a*) of this section, of the fact of such application, together with notice that on a day certain, which shall be at least two weeks after the last appearance of said advertisement, the court, or a master appointed for the purpose, will hear evidence concerning the alleged absence of the presumed decedent, and the circumstances and duration thereof.

NOTE.—This is Section 1 of the Act of May 28, 1913, P. L. 373, 5 Purd. 5884, somewhat condensed and with slight changes in wording so as to make the language uniform with that of the last preceding clause. The definition of "the proper county" contained in Section 8 of the Act of 1913 is embodied in the present clause; and the provision for application to the register of wills is omitted. Provision is made for the grant of ancillary letters to others than the domiciliary executor or administrator. Cross-reference is made to the last preceding clause as to manner and time of advertisement.

Section 2 of the Act of 1913, 5 Purd. 5885, providing for affidavits by residents of the ward, etc., where the presumed decedent was last known to reside, is recommended for repeal.

(*c*) At the hearing in either of the cases provided for in the preceding clauses of this section, the orphans' court shall take such legal evidence as shall be offered, for the purpose of ascertaining whether the presumption of death is established, or may appoint a master to take such testimony and report his findings thereon; and no person shall be disqualified to testify by reason of his or her relationship as husband or wife to the presumed

decedent, or of his or her interest in the estate of the presumed decedent.

NOTE.—This embodies the provisions of Section 2 of the Act of June 24, 1885, P. L. 155, 1 Purd. 1075, Section 2 of the Act of May 28, 1913, P. L. 369, 5 Purd. 5886, and Section 3 of the Act of May 28, 1913, P. L. 373, 5 Purd. 5885.

The provision for the appointment of a master is new.

(*d*) If satisfied, upon such hearing, or upon the report of such master, that the legal presumption of death is made out, the court shall so decree, and the court may determine in such decree the date when such presumption arose, and shall forthwith cause to be published for three successive weeks, in the manner provided in clause (*a*) of this section, a notice requiring the presumed decedent, if alive, to produce in court satisfactory evidence of his continuance in life, such evidence to be produced within twelve weeks from the date of the last publication of the notice in the case of an original application for the grant of letters, and within four weeks from such date in the case of an application for ancillary letters.

NOTE.—This is a combination of Section 3 of the Act of June 24, 1885, P. L. 155, 1 Purd. 1076, Section 3 of the Act of May 28, 1913, P. L. 369, 5 Purd. 5886, and Section 4 of the Act of May 28, 1913, P. L. 373, 5 Purd. 5885, the four weeks' limitation in the case of ancillary letters being derived from the latter act. The provision as to determining the date when the presumption arose is new.

(*e*) If, within said period, evidence satisfactory to the orphans' court of the continuance in life of the presumed decedent shall be presented, said decree shall be vacated; but if such evidence shall not be forthcoming, such decree shall be confirmed absolutely, and it shall be the duty of the court to order the register of wills to issue letters of administration to the person thereto entitled, or to receive for probate the last will and testament of

such presumed decedent and, if duly proved, to admit the same to probate and issue letters testamentary thereunder; and the said letters, until revoked, and all acts done in pursuance thereof and in reliance thereupon, shall be as valid as if the presumed decedent were really dead.

NOTE.—This is a combination of Section 4 of the Act of June 24, 1885, P. L. 155, 1 Purd. 1076, Section 4 of the Act of May 28, 1913, P. L. 369, 5 Purd. 5886, and Section 5 of the Act of May 28, 1913, P. L. 373, 5 Purd. 5885.

The word "vacated" has been substituted for "annulled" in the third line; and the provision as to probate is new.

(*f*) Whenever the said court shall enter a decree that the presumption of death of any person has been established, and such decree shall be confirmed absolutely, the real estate of the presumed decedent shall pass and devolve as in the case of actual death, and the persons entitled by will or under the intestate laws may enter and take possession. In case the presumption of death is thereafter rebutted by adequate proof that the presumed decedent is in fact alive, and said decree is vacated, said real estate shall revert to him as fully as though such decree had never been entered, subject, however, to payment of the costs and expenses of the proceedings and advertisement aforesaid. Such decree, when confirmed absolutely, may be recorded in the office of the recorder of deeds of the proper county in the deed-book, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the names of the persons taking the real estate, and, if so recorded, and the persons taking the real estate sell or mortgage the same, the purchaser or mortgagee shall take a good title, free and discharged of any interest or claim of the presumed decedent; but the persons taking such real estate shall not sell, convey or mortgage the same or any part thereof without first giving bond, in an amount to be fixed by the orphans' court and with sureties to be approved by said court,

conditioned to account for and pay over to the presumed decedent, in case he is actually alive, the value of the real estate sold or conveyed, or, in case of the making of a mortgage, to pay the amount of the mortgage and interest thereon, or, in case of a foreclosure of such mortgage, to account for and pay over the value of the real estate mortgaged. When the presumed decedent shall have been absent and unheard of for twenty-one years, such bond shall be taken without sureties.

NOTE.—This is Section 5 of the Act of May 28, 1913, P. L. 369, 5 Purd. 5886, with some changes in phraseology, and altered so as to require bond for the value of the property on any conveyance, instead of merely for the proceeds of sale, and to cover the case of a mortgage of the property.

(g) The executor or administrator to whom letters have been issued upon the estate of a presumed decedent, as aforesaid, shall administer the estate in the same manner and with the same effect as the same would be administered under existing laws of this commonwealth if the presumed decedent were in fact dead; and the orphans' court, at the audit of the account of an ancillary administrator of a presumed decedent, shall decree the balance, if any, shown thereby, to the expense of administration and the debts of the presumed decedent, due to residents of this commonwealth, and the overplus, if any, to the executor or administrator of said presumed decedent in the foreign jurisdiction, for the purpose of administration and distribution.

NOTE.—This is Section 6 of the Act of May 28, 1913, P. L. 373, 5 Purd. 5885, with the insertion of the words "executor or" and the omission of the word "ancillary" in the first line, thus making the provisions of the first six lines apply to original as well as ancillary administration. The following parts are confined to ancillary administration.

The provisos to the section read as follows:

"*Provided, however,* That before any distribution of any such estate, the alleged creditors, residing in this commonwealth, shall respectively give sufficient security

to be approved by the said court, in such sum and form as the court shall direct, with condition that, if the presumed decedent shall in fact be alive, they will respectively refund the amount received by each, with interest thereon, if they shall not be legally entitled to retain the same: *Provided further*, That before said court shall decree the payment of any overplus to the foreign executor or administrator as aforesaid, said court shall be satisfied that the presumption of death of the presumed decedent has been established in said foreign jurisdiction according to law."

The repeal of these provisos is recommended: the first because there seems to be no sufficient reason to require creditors who have been awarded payment of their just claims to refund the amounts because the presumed decedent proves to be alive; the second because, before directing the issuance of ancillary letters, the court has itself inquired into the establishment of the presumption of death.

(*h*) Before any distribution of the proceeds of the estate of such presumed decedent, the persons, other than creditors, entitled to receive the same shall respectively give sufficient real or personal security, to be approved by the orphans' court having jurisdiction, in such sum and form as the court shall direct, with condition that if the said presumed decedent shall in fact be at the time alive, they will respectively refund the amounts received by each on demand, with interest thereon. If any person or persons entitled to receive the same shall refuse or neglect or be unable to enter such security, the orphans' court may, upon petition of any person interested, and upon due notice to all persons interested, so far as such notice can reasonably be given, appoint a suitable person or corporation as trustee to receive and hold the share of the distributee refusing or neglecting or being unable to enter security as aforesaid until the further order of the court, such trustee not to be an insurer of the trust fund, and to be liable to the person or persons interested therein only for such care, prudence and diligence in the execution of the trust as other trustees are liable for. If the said court shall be satisfied, from the evidence adduced at the hearing to ascertain whether the pre-

sumption of death is established, or from the report of the master, that there is no likelihood of the presumed decedent's being still alive, then the said court may, at its discretion, accept refunding bonds from the distributees of the presumed decedent's estate without requiring sureties thereon.

NOTE.—This is the second proviso to Section 5 of the Act of June 24, 1885, 1 Purd. 1076, as amended by the Act of June 11, 1915, P. L. 945, 5 Purd. 5887, now changed by excluding creditors from the requirement of refunding bonds, and by conforming the provisions where no bond is given to those of Section 23 of this draft relating to security by legatees for life, founded on the Act of May 17, 1871, P. L. 269.

The present clause also covers Section 7 of the Act of May 28, 1913, P. L. 373, 5 Purd. 5886.

(*i*) The orphans' court may revoke the said letters and vacate the decree that the presumption of death has been established, at any time, on due and satisfactory proof that the presumed decedent is in fact alive. After such revocation all the powers of the executor or administrator shall cease, but all receipts or disbursements of assets, and other acts previously done by him, shall remain as valid as if the said letters were unrevoked. The executor or administrator shall settle an account of his administration down to the time of such revocation, and shall transfer all assets, remaining in his hands, to the person as whose executor or administrator he has acted, or to his duly authorized agent or attorney. Nothing in this section contained shall validate the title of any person to any money or property received as surviving spouse, next of kin, heir, legatee or devisee of such presumed decedent, but the same may be recovered from such person, in all cases in which such recovery would be had, if this act had not been passed.

NOTE.—This is the first part of Section 5 of the Act of June 24, 1885, 1 Purd. 1076, as amended by the Act of June 11, 1915, P. L. 945, 5 Purd. 5887, with slight

changes in wording, the inclusion of executors as well as administrators, and the insertion of the provision for vacation of the decree that the presumption of death has been established.

(*j*) After revocation of the letters and vacation of the decree that the presumption of death has been established, the person erroneously presumed to be dead may, on suggestion filed of record of the proper facts, be substituted as plaintiff or petitioner in all actions or proceedings, at law, in equity, or in any orphans' court, brought by the executor or administrator, whether prosecuted to judgment or decree or otherwise. He may, in all actions or proceedings previously brought against the executor or administrator, be substituted as defendant or respondent, on proper suggestion filed by himself, or by proper service of writ or other process, but shall not be compelled to go to trial in less than three months from the time of such suggestion filed or process served. Judgments or decrees recovered against the executor or administrator before revocation and vacation, as aforesaid, of the letters and decree, may be opened on application by the presumed decedent, made within three months from the said revocation and supported by affidavit, denying specifically, on the knowledge of the affiant, the cause of action, or specifically alleging the existence of facts which would be a valid defense; but if, within the said three months, such application shall not be made, or being made, the facts exhibited shall be adjudged an insufficient defense, the judgment or decree shall be conclusive to all intents, saving the defendant's right to have it reviewed, as in other cases, on appeal. Notwithstanding the substitution of the presumed decedent as defendant in any judgment or decree, as aforesaid, it shall continue as a lien upon his real estate in the county for the period of five years from the date of its entry, as other judgments, unless and until it shall be set aside by the court below, or reversed in the proper appellate court.

NOTE.—This is Section 6 of the Act of June 24, 1885, P. L. 155, 1 Purd. 1076, altered by inserting the references to vacation of the decree, by substituting the words "on appeal" for "by certiorari or writ of error," by substituting "the proper appellate court" for "the supreme court" in the last line, and by redrafting the last sentence, which, in the Act of 1885, provides that after substitution the judgment shall "become a lien" and shall so continue for five years, without stating when the five years shall begin.

(*k*) Whenever, hereafter, letters testamentary or of administration shall be issued upon the estate of any person, presumed to be dead, on account of absence of seven years or more from the place of his last domicile, in accordance with the foregoing provisions of this section, the person having custody of any will which may have been left by such presumed decedent, in case letters of administration have been issued, or of any later will, in case letters testamentary have been issued, or any creditor or any person interested in the estate, may file a petition in the orphans' court in which the proceedings to establish the death by presumption have been held, as aforesaid, setting forth the facts of the case, a copy of said will or later will, or an averment that such will exists, and the names of all persons interested in the estate of the presumed decedent. Upon the filing of such petition, said court, after due notice to all parties in interest, may enter an order directing the register of wills to receive proof in support of the averments of said petition and, if established, to admit said will or later will to probate and, if an executor be named in said will, to revoke said letters of administration, or, in case an earlier will shall have been admitted to probate, to set aside such probate and revoke the letters testamentary issued thereunder.

NOTE.—This is Section 1 of the Act of April 14, 1905, P. L. 153, 5 Purd. 5884, altered by providing for the filing of a petition in the orphans' court, instead of proceeding directly before the register, and by inserting the words "or an averment that such will exists," to cover the case of refusal to produce the will or its unlawful destruction, and also altered so as to include the case of a later will.

(*l*) Thereupon the register of wills shall issue a citation to the person to whom letters of administration or letters testamentary have been issued, as aforesaid, and to all persons interested in the estate of the presumed decedent, to appear upon a day fixed, and to show cause why the said alleged will or later will should not be admitted to probate.

NOTE.—This is Section 2 of the Act of April 14, 1905, P. L. 153, 5 Purd. 5884, changed to conform to the changes made in the last preceding clause.

(*m*) Upon the return of the citation, if the register of wills shall be satisfied from all the evidence that may be adduced that the proposed will was, in fact, the last will and testament made by the presumed decedent before his departure or disappearance from his residence, the said will shall be admitted to probate as if the testator were in fact dead. If, upon such probate, it appears that an executor is named in the will, the letters of administration previously granted shall be revoked, and letters testamentary shall be issued to said executor, in the same manner and form as if the testator were in fact dead, but if no executor shall be named in such will, then a certified copy of said will shall be attached to the letters of administration theretofore issued, or to a certified copy of such letters. Thereafter the executor or administrator shall execute the said will according to its terms, and all property of the decedent shall be distributed and pass, as provided by said will, to the several legatees and devisees named therein. In case an earlier will shall have been admitted to probate, the letters testamentary issued thereunder shall be revoked and letters shall be issued under the said last will, or if no executor shall be named in said last will, then letters of administration with the will annexed shall be issued to the person or persons entitled thereto.

NOTE.—This is Section 3 of the Act of April 14, 1905, as amended by the Act of June 1, 1915, P. L. 689, 5 Purd. 5884, further altered by bringing the last proviso into the body of the section, and by providing for the case of a later will.

The remaining proviso reads: "*Provided*, That nothing herein shall prevent the orphans' court from revoking the said letters, as hereinbefore provided, upon satisfactory proof that the supposed decedent is in fact alive; after which revocation the powers of the executor or administrator, and the rights of the legatees and devisees under said will, shall cease; and all receipts and disbursements of assets, and other acts previously done by them shall remain as valid as if the said letters were unrevoked; and providing that legatees and devisees may be called upon, at any time, by the supposed decedent to account for any property which they may have received, remaining in their hands, exactly as under the foregoing provisions of this act, the executor or administrator may be called upon to account for such property or assets."

It is recommended that this be omitted as unnecessary, its provisions being covered by other clauses of this section.

(*n*) The costs attending the issuance or revocation of letters shall be paid out of the estate of the presumed decedent; and costs arising upon an application for letters which shall not be granted shall be paid by the applicant.

NOTE.—This is Section 7 of the Act of June 24, 1885, P. L. 155, 1 Purd. 1077.

SECTION 7 (*a*) Before any register shall issue letters of administration, letters testamentary, or of administration with the will annexed, he shall administer an oath or affirmation to the person or persons receiving the same, in the following form, viz.: You do swear (or affirm) that as executor of the last will and testament (or as administrator of the estate) of A. B., deceased, (as the case may be), you will well and truly administer the goods and chattels, rights and credits of said deceased, according to law; and also will diligently and faithfully regard and well and truly comply with the provisions of the law relating to collateral inheritances.

NOTE.—This is Section 14 of the Act of March 15, 1832, 1 Purd. 1075, which, as the Commissioners remarked, contained in the form of oath the clause as to collateral inheritances required by Section 5 of the Act of April 7, 1826, P. L. 227.

(*b*) In all cases where a corporation is or shall be charged with the execution of any trust, the president, vice-president, trust officer, secretary, treasurer or actuary of such corporation, shall make the oath or affirmation directed to be taken by private persons in such cases.

NOTE.—This is Section 1 of the Act of February 16, 1877, P. L. 3, 4 Purd. 4923.

SECTION 8 (*a*) It shall be the duty of every register upon his granting any letters of administration, domiciliary or ancillary, of the goods and chattels of any person dying intestate, to take a bond or bonds, from the person or persons receiving such letters, with two or more sufficient individual sureties, or sufficient corporate security, or the register may, in his discretion, permit any corporation to which letters are granted to give its own bond without surety. In fixing the amount of any bond, respect shall be had to the value of the estate; and all bonds shall be in the name of the commonwealth, with a condition in the following form, viz.: The condition of this obligation is, that if the above-bounden A. B., administrator of all and singular the goods, chattels and credits of C. D., deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have come or shall come to the hands, possession or knowledge of him the said A. B., or into the hands and possession of any other person or persons, for him, and the same so made, do exhibit or cause to be exhibited into the register's office, in the county of , within thirty days from the date hereof, and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased, at the time of his death, which at any time after shall come to the hands and possession of the said A. B., or into the hands and possession of any other person or persons for him, do well and truly administer according to law, and further do make or cause to be made, a just and true account of his said administration, at the expiration of six months from the date hereof, or when thereunto required by the orphans' court, and all the rest and residue

of the said goods, chattels and credits, which shall be found remaining upon the said administrator's account, the same being first examined and allowed by the orphans' court of the county having jurisdiction, shall deliver and pay unto such person or persons as the said orphans' court, by their decree or sentence pursuant to law, shall limit and appoint, and shall well and truly comply with the laws of this commonwealth relating to collateral inheritances, and if it shall hereafter appear that any last will and testament was made by the said deceased, and the same shall be proved according to law, if the said A. B., being thereunto required, do surrender the said letters of administration into the register's office aforesaid, then this obligation to be void, otherwise to remain in full force: *Provided*, That in every case of special administration, the form of the foregoing condition shall be modified so as to suit the circumstances of such case.

NOTE.—This is Section 24 of the Act of March 15, 1832, P. L. 139, 1 Purd. 1077, altered by inserting "domiciliary or ancillary" in the second line, by providing for two individual sureties or corporate security or the bond, without surety, of a corporation to which letters are granted, by changing "one year" to "six months" as the period for filing the account, and substituting "at the expiration of" for "within," and by substituting "required by the orphans' court" for "legally required."

Section 24 of the Act of 1832 corresponded to Section 23 of the Commissioners' Draft. This was substantially the same as Section 1 of the Act of April 19, 1794, 3 Sm. L. 143, with some verbal alterations and the addition of a clause as to collateral inheritances, and the proviso as to special administration. The draft fixed the time for filing the inventory at forty days, while the act made it thirty days. The same difference exists between Section 16 of the Act of 1832 and the draft.

(*b*) It shall be the duty of the register of wills, in granting letters of administration with the will annexed, to take a bond as prescribed in the foregoing clause, that shall include adequate security for the faithful accounting for the proceeds of any sales of real estate the administrator may make under such will; and the sureties taken shall be liable therefor, as well as for any personal effects, to

come into the hands of the administrator, who shall settle his account thereof before the orphans' court.

NOTE.—This is founded on Section 8 of the Act of April 22, 1856, P. L. 533, 1 Purd. 1080. The proviso is omitted; "a bond as prescribed in the foregoing clause, that shall include," is inserted; "shall" is substituted for "may" in the provision as to liability; and "register and" is omitted before "orphans' court" in the last line.

(*c*) Before the register shall issue letters testamentary to any executor, not being an inhabitant of this commonwealth, he shall take from him a bond, with two or more sufficient individual sureties, being inhabitants of this commonwealth, or with sufficient corporate security, or the register may, in his discretion, permit any corporation to which such letters are granted to give its own bond without surety. In fixing the amount of any bond, respect shall be had to the value of the estate to be administered; and all bonds shall be in the name of the commonwealth, with the following condition, viz.: The condition of this obligation is, that the said A. B., executor of the last will and testament of C. D. deceased shall make a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, being within this commonwealth, which have come or shall come to his hands, possession or knowledge, or into the hands and possession of any other person for him, and the same so made do exhibit into the office of the register of the county of within thirty days from the date hereof, and the same goods do well and truly administer, according to law, and make a just and true account of all his actings and doings therein, at the expiration of six months from the date hereof, or when thereunto lawfully required, and shall faithfully account for the proceeds of any sales of real estate he may make under such will, and shall well and truly comply with the laws of this commonwealth relating to collateral inheritances and in all other respects with the laws of this commonwealth relating to his duty as executor, then this obligation to be void, otherwise to remain in full force.

NOTE.—This is Section 16 of the Act of March 15, 1832, P. L. 139, 1 Purd. 1077, changing the period for filing an account from one year to six months, in accordance with the change made in the other parts of the present draft, changing "in" to "at the expiration of," and inserting a provision as to corporations giving their own bonds, and a provision to cover sales of real estate corresponding to clause (*b*).

Section 16 of the Act of 1832 corresponded to Section 15 of the Commissioners' Draft, and was new in the Act of 1832. The Commissioners remarked that the Act of April 3, 1829, P. L. 122, authorizing proceedings to vacate letters testamentary where the executor had removed from the state and ceased to have a known residence therein for a certain period, perhaps prohibited the granting of letters testamentary to non-residents.

(*d*) If any register shall grant letters testamentary to any person not being an inhabitant of this commonwealth, or shall grant any letters of administration to any person or persons whatsoever, without having in either case taken a bond in the manner hereinbefore prescribed, such letters shall be void, and every person acting under them shall be deemed, and may be sued, and in all respects treated as an executor of his own wrong; and the register granting the same, and his sureties, shall be liable to pay all damages which shall accrue to any person by reason thereof.

NOTE.—This is Section 27 of the Act of 1832, 1 Purd. 1078, which corresponded to Section 34 of the Commissioners' Draft. That section was principally derived from Section 2 of the Act of March 27, 1713, 1 Sm. L. 81, and contained nothing new except the extension of the provisions to letters testamentary granted to non-residents.

The only change now made is to omit "with sureties," in line 5, so as to cover cases of a corporation giving its own bond.

(*e*) In any case where application is made for letters testamentary or of administration on the estate of a decedent who was at the time of his death a fiduciary, it shall be within the discretion of the register of wills to whom such application is made to require the person or corporation to whom such letters are issued to enter,

in addition to any other bond required by this act, a bond in a sufficient amount, with sureties as aforesaid, or, in case of a corporation, its own bond, with or without sureties, conditioned for the proper application of the property held by such decedent as fiduciary and coming into the hands and possession of the person or corporation to whom such letters are issued.

NOTE.—This is a new clause, introduced to cover the case where moneys or property held by a decedent as executor, administrator, guardian or trustee, come into the possession of his executor or administrator pending the appointment of a successor to the decedent in the trust.

(*f*) All bonds taken by any register, in pursuance of this act, from any executor or administrator, may be excepted to before such register by any person interested, in respect of the sufficiency of the sureties therein, or the amount of the bond, or for any other cause. Whenever any such exception shall be so made to any such bond, the register shall give notice thereof to the executor or administrator and require him to appear before him in a reasonable time, not exceeding ten days, and show cause against the allowance of such exception. If upon the hearing of the objections of all persons interested, and of such executor or administrator, or of such of them as shall appear, such register shall see cause, he shall order such executor or administrator to find additional sureties, or to give security in a larger amount, or make such other order as the case may require. If such executor or administrator shall refuse to comply with such order, or if he shall neglect so to do during the space of thirty days after the making thereof, the register shall revoke the letters granted to him, and grant other letters in such form as the case shall require, to the person by law next entitled thereto, such person giving to such register the security by him ordered as aforesaid. No such exception shall be so made, or proceedings thereunto be had before the register, after three months elapsed from the time of the filing of a full

and perfect inventory by such executor or administrator of the whole of the estate in question.

NOTE.—This is Section 28 of the Act of 1832, 1 Purd. 1078, which corresponded to Section 35 of the Commissioners' Draft. That section was new in the Act of 1832 and was intended as a substitute for so much of Section 2 of the Act of March 27, 1713, 1 Sm. L. 81, as related to the taking of insufficient sureties, and to supply means by which the register might revise his own proceedings and correct inadvertent and perhaps unavoidable errors.

The present draft changes "one year" in the last sentence to "three months" in accordance with the change in time for filing the account. It also permits exceptions "for any other cause."

Section 2 of the Act of April 4, 1797, 3 Sm. L. 296, 2 Purd. 2296, provides: "In all cases where a return of nulla bona shall have been made by the sheriff of the proper county to an execution against any such executors or administrators, their sureties shall, on notice thereof, unless they can show goods or chattels, lands or tenements, in some other county, which may be seized and taken in execution by a testatum fieri facias, to satisfy the same, be liable to pay the amount of the debt and costs therein, in actions brought against them on the said bonds, and such further proof or evidence in support thereof, as by law would have entitled the suitor or suitors to recover his, her or their demand of the said executors or administrators, de bonis propriis: *Provided,* Such suits shall be instituted against the sureties, within seven years after the date of the respective bonds; and the whole amount of the sums of money to be recovered thereupon shall not exceed the penalties of the said bonds respectively."

This was held, in Com. *vs.* Patterson, 8 Watts 515, to be limited to cases of additional security given by order of court.

The repeal of this section of the Act of 1797, as unnecessary, is recommended.

SECTION 9 (*a*) All bonds given or hereafter to be given by fiduciaries shall be held in trust for the use of the commonwealth, and such person or persons as may be interested therein; and suits may be brought thereon, from time to time, by all persons interested therein, as provided in the sixth section of the act entitled, "An

act relating to bonds, with penalties and official bonds," approved the 14th day of June, 1836.

NOTE.—This is Section 44 of the Act of March 15, 1832, 1 Purd. 1079, which did not correspond to anything in the Commissioners' Draft, altered by substituting for the reference there made to Section 4 of the Act of March 28, 1803, a reference to Section 6 of the Act of June 14, 1836, P. L. 639, 1 Purd. 472, and by substituting "fiduciaries" for "executors, administrators or guardians."

(*b*) Whenever any fiduciary has heretofore given, or shall hereafter give, any bond conditioned for the due performance of his duties, or for the accounting for money in his hands, such fiduciary or any creditor, beneficiary, or other party in interest, may present a petition to the orphans' court of the proper county, alleging that the amount of such bond is greater than the exigencies of said trust require and setting forth the facts and circumstances upon which such allegation is based, and praying that such bond be reduced to an amount which shall be stated in the petition. At the hearing of said petition, after such notice as the court may require, if any, the court may, at its discretion, reduce the bond to such an amount as it may deem proper and necessary to give adequate protection to all parties concerned, but not to an amount lower than that specified in said petition. The costs of said proceeding shall, at the discretion of the court, be paid out of the estate to protect which said bond was given, or by the petitioner.

NOTE.—This is a combination of Sections 2, 3 and 4 of the Act of May 3, 1915, P. L. 218, 6 Purd. 7038, changed so as to provide that the petition shall "allege" that the bond is too large, instead of "setting forth that in his opinion" this is so.

(*c*) Any fiduciary, required by law or by the order of any orphans' court, to give a bond as such, may include as a part of the lawful expense of executing his trust such reasonable sum paid to a company, authorized under the

laws of this state so to do, for becoming his surety on such bond as may be allowed by the court in which he is required to account, not exceeding, however, one per centum per annum on the amount of such bond.

NOTE.—This is Section 1 of the Act of June 24, 1895, P. L. 248, 4 Purd. 4914, altered by substituting "fiduciary" for "receiver, assignee, guardian, committee, trustee, executor or administrator," and by inserting the word "orphans'."

Section 2 of the Act of 1895 reads: "This act shall take effect immediately; and all acts and parts of acts inconsistent herewith are hereby repealed."

The Act of 1895 should be repealed only so far as it relates to fiduciaries within the scope of the present act.

SECTION 10. The executors or administrators of every decedent shall, immediately after the granting of letters testamentary or of administration to them, cause notice thereof to be given in one newspaper, published at or near the place where such decedent resided, once a week, during at least six successive weeks, together with their names and places of residence, and in every such notice they shall request all persons having claims or demands against the estate of the said decedent to make known the same, and all persons indebted to the said decedent to make payment, to them without delay.

NOTE.—This is Section 1 of the Act of February 24, 1834, P. L. 73, 1 Purd. 1098, with the addition of the provision as to notice to debtors.

Section 14 of the Act of April 19, 1794, 3 Sm. L. 143, provided: "That no creditor, who shall neglect to exhibit his account to the executors or administrators, within twelve months after public notice given in one or more of the public newspapers of this state, and continued in such public newspapers for four weeks, shall be entitled to demand or receive any dividend of such remaining assets." This is superseded by Section 49 (*d*) of the present draft.

SECTION 11 (*a*) It shall be the duty of the said executors or administrators to make a true and perfect inventory of all the goods, chattels and credits of the deceased, as

far as they may know or can ascertain them, and file the same in the register's office within thirty days from the time of administration granted: *Provided*, That in the case of a will of a decedent, not resident, at the time of his decease, within this commonwealth, proved in another state or in a foreign country, whereof letters testamentary or of administration with the will annexed may be granted in this state, or in a case of ancillary administration of the estate of a non-resident intestate, the inventory herein mentioned shall be of the goods, chattels and credits of the deceased within this commonwealth.

NOTE.—This is Section 15 of the Act of March 15, 1832, P. L. 135, 1 Purd. 1089, with the insertion of the provision as to ancillary administration of an intestate's estate. The provision as to the filing of the account has been omitted here and inserted in Section 46 (*a*).

(*b*) In case of the failure or refusal of any executor or administrator to file an inventory as aforesaid, the orphans' court shall have power, on petition of any creditor of the decedent or any party in interest, to issue a citation to such executor or administrator to show cause why he should not file such inventory and, if no sufficient cause be shown on the return of such citation, said court may order the filing of such inventory, and may enforce such order by attachment as in other cases.

NOTE.—This is a new clause, introduced to provide a remedy in the case mentioned, additional to the remedy by the removal of the executor or administrator under Section 53 (*a*) 1, or by action on the bond of an administrator, there being instances in which the only adequate remedy is by compelling the filing of the inventory.

(*c*) All bonds, notes and other evidences of debt, also all other claims and demands for money, or any other personal property owned or held by the deceased at the time of his decease, shall, as far as the same may be known to his executors or administrators, be included in the inventory to be made and returned as aforesaid.

NOTE.—This is Section 5 of the Act of February 24, 1834, 1 Purd. 1090, which corresponded to Section 6 of the Commissioners' Draft.

The section was new in the Act of 1834 and was intended to correct a practice of omitting bonds and other evidences of debt from the inventory on the ground that they were not properly subjects of appraisement.

(*d*) The appointment of any person to be an executor shall in no case be deemed a release or extinguishment of any debt or demand which the testator may have had against him, but such debt shall be included in the inventory, and be subject to distribution like other personal estate.

NOTE.—This is Section 6 of the Act of February 24, 1834, 1 Purd. 1090, which corresponded to Section 7 of the Commissioners' Draft. They remarked that it was declaratory of the rule then prevailing, saying that formerly the appointment of a debtor as executor "was deemed at law a release or extinguishment of the debt."

(*e*) The rents of any real estate accruing to any person as tenant for life of such estate, who had demised the same, for a term or time not fully expired at his decease, shall go to and be vested in the executors or administrators of such tenant, and the due proportion of such accruing rent, to be computed according to the time elapsed at the decease of such tenant, shall be included in the inventory of personal assets.

NOTE.—This is Section 7 of the Act of February 24, 1834, 1 Purd. 1091, which corresponded to Section 8 of the Commissioners' Draft and was derived from the Statute of 11 Geo. II, c. 19. The Commissioners remarked: "As the statute is already deemed a part of our law, there is nothing in the section which requires particular remark."

The only change made is to insert "as tenant," after "to any person."

(*f*) The arrearages of any rent-charge, or other rent or reservation in nature of a rent, due at the death of any tenant of such rent, in fee-simple or fee-tail, or for term

of life or lives, shall go to and be vested in the executors or administrators of such tenant, and be included in the inventory, and appraised as personal assets.

NOTE.—This is Section 8 of the Act of February 24, 1834, 1 Purd. 1091, which corresponded to Section 9 of the Commissioners' Draft and was derived from the Statute of 32 Hen. VIII, c. 37.

The words "of such rent" have been inserted after "death of any tenant," and omitted after "life or lives."

(*g*) All estates in lands or tenements, of which the decedent was seised at the time of his decease, for the life or lives of another person or persons, shall, unless such estate have been limited to the decedent and his heirs, go to the executors or administrators of such decedent, and be included in the inventory, and be subject to distribution in like manner as leases for terms of years.

NOTE.—This is Section 9 of the Act of February 24, 1834, 1 Purd. 1091, which corresponded to Section 10 of the Commissioners' Draft and was derived from the Statute of 29 Car. II, c. 3, Section 12.

(*h*) Whenever personal property or assets of any kind, not contained in the inventory made and returned as aforesaid, shall afterwards come to the possession or knowledge of the executor or administrator, he shall make an inventory thereof and file the same in the office of the proper register, within thirty days from the time of the discovery thereof.

NOTE.—This is Section 3 of the Act of February 24, 1834, P. L. 73, 1 Purd. 1090, except that the period fixed by that section is four months.

The provision seems to have been new in the Act of 1834. The Commissioners of 1830 remarked: "This period (four months) may seem long, but the reason which prevailed with us in fixing a time was the inconvenience which might otherwise result in cases where property in small parcels may be discovered at successive intervals."

The Commissioners now recommend shortening the time to thirty days, the period allowed for filing the original inventory.

Section 11 of the Act of February 24, 1834, 1 Purd. 1091, which corresponded to Section 12 of the Commissioners' Draft, provides: "Whenever any executor or administrator shall sell, at public auction or vendue, any of the personal estate of the decedent, he shall, within thirty days thereafter, file in the office of the register having jurisdiction, a just and true account of the articles so sold, and the prices and purchasers thereof." The Commissioners reported that this practice was not infrequent in some parts of the state, but that, as an express direction, the provision was new.

This provision is understood to be obsolete, and is therefore recommended for repeal.

(*i*) Every executor or administrator shall cause a just appraisement to be made, by two or more appraisers, of the goods, chattels and credits of the decedent, of which an inventory is to be made, agreeably to the preceding clauses of this section; and the said appraisers shall be sworn or affirmed well and truly, and without prejudice or partiality, to value and appraise said goods, chattels and credits, and in all respects to perform their duty as appraisers, to the best of their skill and judgment.

NOTE.—This is Section 26 of the Act of March 15, 1832, P. L. 135, 1 Purd. 1091, altered by inserting the words "or more" in line 2.

(*j*) It shall be the duty of the executors and administrators, having given convenient notice to the appraisers of the decedent's estate, of a time and place for making the inventory and appraisement thereof, to produce or make known to them, in the presence of such of the persons interested in the estate as may attend, the whole of the personal estate of the decedent, which may have come to their possession or knowledge; and the inventory and appraisement thereof being finished, and certified by the appraisers, to file the same in the office of the proper register.

NOTE.—This is Section 2 of the Act of February 24, 1834, 1 Purd. 1091. It seems to have been new in that act. Some parts of its details were derived from the Statute of

32 Hen. VIII, c. 5. The language has been changed so as to provide that the inventory and appraisement shall be filed instead of returned.

(*k*) The appraisers of the estate of a decedent shall be respectively entitled to receive therefrom, as compensation for their services in appraising the estate as aforesaid, such sum as the orphans' court having jurisdiction of the accounts of the executors or administrators shall deem proper, taking into consideration the labor, skill and responsibility involved.

NOTE.—This is a new section. The Commissioners' Draft of the Act of 1834 provided a compensation of two dollars a day. The act as passed (Section 10, 1 Purd. 1091) allowed only one dollar. This was amended by the Act of May 23, 1913, P. L. 344, so as to provide a compensation of two dollars and fifty cents a day. The Act of May 6, 1915, P. L. 267, 5 Purd. 5889, raised this to five dollars.

The Commissioners are of opinion that the compensation of appraisers should not be fixed by law at a definite sum for the reason that the labor and responsibility and skill required of the appraisers are not uniform. The estate may consist in part of raw materials or the partly finished products of a factory, stocks or bonds having no market value, stock in trade of a merchant, paintings or articles of a like nature, for the proper appraisement of which the services of an expert may be necessary. A compensation of one dollar or five dollars per day may in such cases be absurd. On the other hand, there are many cases where a compensation of $2.50 would be entirely adequate, and $5.00 too much. The Commissioners feel that the amount justly earned may be safely left to the court, as is the case with the commissions of an accountant.

SECTION 12 (*a*) The widow, if any, or, if there be no widow or if she has forfeited her rights, then the children forming part of the family of any decedent dying, testate or intestate, within this commonwealth, or dying outside of this commonwealth, but whose estate is settled in this commonwealth, may retain or claim either real or personal property, or the proceeds of either real or per-

sonal property, belonging to said estate, to the value of five hundred dollars, and the property so retained or claimed shall not be sold, but suffered to remain for the use of the widow or children. It shall be the duty of the executor or administrator of such decedent to have the said property, if personal, appraised and set apart to said widow or children by the appraisers appointed to appraise the other personal estate of the decedent, or, if real, then by two appraisers to be appointed by the orphans' court, who may be the same persons appointed to appraise the personal estate. If said five hundred dollars, or any part thereof, shall be claimed out of money or the proceeds of real or personal property belonging to the estate, it shall be the duty of the executor or administrator to set apart to said widow or children the amount so claimed out of said money or out of the proceeds of said real or personal property after he shall have sold the same. Should any or all of the appraisers of the other personal estate be unable to make the appraisement of personal property provided for by this section, or should there be no such appraisers, the orphans' court of the proper county may appoint a properly qualified appraiser or appraisers to act in the place of said appraiser or appraisers of the other personal estate of the decedent.

NOTE.—This is founded on Section 5 of the Act of April 14, 1851, P. L. 612, 1 Purd. 1092, as amended by the Act of July 21, 1913, P. L. 877, 5 Purd. 5889. The provisos of that section as to liens for purchase money and the filing of the appraisement have been transferred to subsequent clauses. The provisions of the Act of May 6, 1909, P. L. 459, 5 Purd. 5889, as to decedents dying outside of the commonwealth, but whose estates are settled in the commonwealth, have been incorporated in the new section. It seems unnecessary to incorporate the provision of Section 1 of the Act of April 8, 1859, P. L. 425, 1 Purd. 1096, that the widow or children may elect to retain the exemption or any part thereof "out of any bank-notes, money, stocks, judgments or other indebtedness." The provision of that section that the appraisement shall be made by the appraisers of the other personal estate

is covered by the amendment of 1913, which is included in the new draft. Since the Act of 1859 applies to the debtor's exemption under the Act of 1849, as well as to the widow's exemption, that act should not be generally repealed.

The reference in the Act of 1851 to the exemption law of 1849, has been omitted as unnecessary and confusing. The amount of the exemption has been increased to five hundred dollars.

The beginning of the section, which reads, "The widow or the children of any decedent," has been changed. The words "or the proceeds of either real or personal property when sold" have also been added to meet the decisions that the exemption cannot be claimed out of the proceeds of property. See Finney's Appeal, 113 Pa. 11; Snyder's Estate, 12 D. R. 536; Thoman's Estate, 16 York 154. A corresponding change has been made in the third sentence. Provision has been made for the case where only a part of the $500 is claimed in money or proceeds of property.

Provisions for appointment by the court of appraisers of real estate and in cases where there are no appraisers of the other personal estate, or where they are unable to act, have been inserted.

The Act of 1851, together with the debtor's exemption Act of 1849, supplied Section 4 of the Act of February 24, 1834, P. L. 70, which is recommended for repeal.

The amount of the exemption was fixed at $300 at a time when the purchasing power of money was far greater than it is at present. The Commissioners are of opinion that the sum to be set apart for the immediate necessities of the widow or children should be increased to $500.

(*b*) The provisions of this section allowing the widow or children of a decedent to retain real property, or the proceeds thereof, to the value of five hundred dollars shall not affect or impair any liens for the purchase money of such real property.

NOTE.—This is founded on the first proviso to Section 5 of the Act of 1851, as amended by the Act of July 21, 1913, P. L. 877, 5 Purd. 5889.

The words "or the proceeds thereof" have been inserted.

(*c*) Such appraisers shall be sworn or affirmed to appraise the property claimed by the widow or children of the decedent under the provisions of this act. The compensation of such appraisers for making an appraisement of personal property shall be included in the compensation allowed by the orphans' court for the performance of their duties as appraisers of the other personal estate of the decedent, and shall be paid out of the decedent's estate; and the compensation of appraisers appointed by the orphans' court as aforesaid shall be fixed by said court and shall also be paid out of the decedent's estate.

NOTE.—This is a new section, founded on Section 2 (*b*) of the new Intestate Act.

The Commissioners are of opinion that the appraisement of real estate should be made by persons specially appointed rather than by the appraisers of the personal estate, who as a general rule are not familiar with real estate valuations; and that their compensation should properly be considered as an administration expense. The widow should receive her exemption without the deduction of such expenses or those of any necessary advertisement as provided in the next section.

(*d*) Upon due proof of compliance with such requirements as to notice, by advertisement or otherwise, as may be prescribed by the orphans' court of the proper county by general rule or otherwise, such court may enter a decree directing the payment of the money, or confirming the appraisement of the personal or real estate chosen by said widow or children, and said appraisement, signed and certified by the appraisers and approved by the court, shall be filed among the records thereof: *Provided*, That all expenses of such advertisement or notice shall be paid out of the decedent's estate.

NOTE.—This is a new section, founded in part on the first proviso of Section 5 of the Act of 1851 as amended by the Act of July 21, 1913, P. L. 877, 5 Purd. 5889, and in part upon Section 2 (*c*) of the new Intestate Act. The provision as to payment of expenses out of the estate is new.

(*e*) 1. In the case of any decedent leaving to survive him any minor child or children forming part of his family, and no widow, his administrator or executor, without request made to him by any one, shall have appraised and set aside, for the use and benefit of all such minor children of said decedent, property to the full value of five hundred dollars.

NOTE.—This is Section 1 of the Act of June 4, 1883, P. L. 74, 1 Purd. 1096, substituting "five hundred dollars" for "now allowed by law," etc., and "minor child or children forming part of his family" for "child or children under the age of fourteen years."

2. The guardian of said child or children, and if there be none, the administrator or executor, with the appraisers, shall make selection of the property to be set aside, and in so doing, the said guardian, or the said administrator or executor, with the appraisers, shall be governed by the necessities of such child or children, under the circumstances of each case.

NOTE.—This is Section 2 of the Act of June 4, 1883, P. L. 74, 1 Purd. 1096, changing "appraiser" to "appraisers" and substituting "in so doing" for "in the same."

(*f*) When any decedent shall leave to survive him a widow or children and an estate not exceeding in value five hundred dollars it shall be lawful for such widow, or for such children by any next friend or guardian, if to said children the right belongs, to petition the orphans' court of the proper county for the appointment of two appraisers, who shall appraise and set aside any property of said decedent, selected by such widow or by such next friend or guardian, in the same manner and with the same effect as if letters testamentary or of administration had issued and the appraisers been selected in the usual way. Such appraisers shall be sworn or affirmed, and shall receive for their services such compensation as shall be allowed by said court

NOTE.—This is Section 3 of the Act of June 4, 1883, P. L. 74, 1 Purd. 1096, the language being slightly changed for the sake of clearness, especially so as to show that the widow need not file her petition by a next friend. The last sentence is new, and the amount is changed from three hundred to five hundred dollars.

(g) Whenever the widow or children of any decedent shall claim the sum of five hundred dollars in value, or any part thereof, under the provisions of this act, out of real estate left by said decedent, and the real estate appraised cannot be divided so as to set apart the amount so claimed in value without prejudice to or spoiling the whole or any parcel of said real estate, and the appraisers may have appraised or shall appraise and value the same at an amount equal to or exceeding the amount claimed by said widow or children out of said real estate, over and above the liens that are upon it, the orphans' court to which such application shall be made may confirm such appraisement and set apart, for the use of the widow or children, such real estate, subject to whatever liens may be against the same; conditioned, however, that the widow or children shall pay the amount of the valuation or appraisement, over and above the liens that may be against the said real estate, in excess of the amount claimed by said widow or children out of said real estate, within one year from the date of confirmation of such valuation. If the widow or children making such claim shall fail to make payment as above provided, the court, on application of any person interested, shall direct the executor or administrator to sell the said real estate, and the procedure in such case shall be the same as is provided by law in cases of sales of real estate for the payment of debts of a decedent.

NOTE.—This is founded on Sections 1 and 2 of the Act of June 1, 1915, P. L. 682, 5 Purd. 5889, which repealed the Act of November 27, 1865, P. L. (1866) 1227, 1 Purd. 1096. The Act of 1915 has been modified so as to make the procedure uniform with that prescribed by Section 2 (*d*) of the new Intestate Act.

(*h*) The real estate, if taken by the widow or children as aforesaid, shall vest in her or them and her or their heirs or assigns, subject to any liens upon it, on her or their paying the surplus over and above the amount claimed by her or them out of said real estate to the parties entitled thereto. Should the real estate be sold as provided in clause (*g*) of this section, then the sum of five hundred dollars or such part thereof as may be claimed out of the real estate shall be paid out of the purchase money to the widow or children, and the balance, after payment of costs and expenses, distributed to the heirs or other persons legally entitled thereto.

NOTE.—This is founded on Sections 3 and 4 of the Act of June 1, 1915, P. L. 682, 5 Purd. 5889, which repealed the Act of November 27, 1865, as above noted. The Act of 1915 has been modified so as to make the procedure uniform with that prescribed by Section 2 (*e*) of the new Intestate Act.

Section 5 of the Act of 1915 provides: "All former appraisements, heretofore made as authorized hereby, are validated and made good and effectual." Section 6 of the Act of 1915 is merely a repealer.

(*i*) In all cases where the appraisement of property, real or personal or both, is confirmed and the property set apart to the widow or children under the provisions of this section, said widow or children shall be entitled to receive for her or their own use the net rents, income, interest and dividends thereof from the date of the death of such decedent: *Provided*, That where the property so set apart shall consist of real estate appraised at an amount exceeding the amount claimed by said widow or children out of said real estate, over and above the liens that are upon it, and the widow or children shall fail to pay the excess over the amount so claimed as provided in clause (*g*) of this section, and the property shall thereupon be sold, there shall be deducted from the sum to be paid to said widow or children out of the proceeds of such sale a proportionate part of the rents and income of such real estate received by such widow or children.

NOTE.—This is a new clause, modeled upon Section 2 (*f*) of the new Intestate Act. It will be of less frequent application under the present act, but seems to be proper.

(*j*) Whenever the widow or children of any decedent shall claim the said five hundred dollars in value, or any part thereof, under the provisions of this section, out of the real estate left by the said decedent and lying in any county of this state other than the county wherein said decedent shall be domiciled at the time of his death, and the orphans' court having jurisdiction of the accounts of the personal representatives of said decedent shall be satisfied, upon petition filed, of the propriety of allowing such claim, it shall be lawful for such court to make a decree authorizing such widow or children to file her or their petition in the orphans' court of the county wherein such real estate may lie, or, in a case where the real estate is divided by a county line, in the county where the mansion house may be situated, or, if there be no mansion house, in the county where the principal improvements may be, or, if there be no improvements, in either county, praying for the appointment of two appraisers. Upon the filing of such petition duly verified, it shall be the duty of the latter court to appoint such appraisers, who shall be duly sworn or affirmed, and shall appraise said real estate, and shall be compensated as directed by said court; and proceedings shall thereupon be had in said court and subject to its supervision and control, in the same manner and with the same effect as is provided in clauses (*g*), (*h*) and (*i*) of this section. In every such case a certified copy of the decree confirming such appraisement, or of such decree of sale and the confirmation thereof, as the case may be, shall forthwith be filed with the clerk of the orphans' court having jurisdiction of the accounts of the personal representatives of the said decedent. The latter court shall in all cases have exclusive jurisdiction of the distribution of the surplus paid by such widow or children, or of the proceeds of such sale, after the payment of costs and expenses, as the case may be.

NOTE.—This is a new clause, modeled on Section 2 (*g*) of the new Intestate Act. The clause seems necessary, although the case may not arise frequently.

(*k*) In all cases where a decree shall be entered by any orphans' court confirming an appraisement of real estate and setting apart the same for the use of the widow or children, a certified copy of such decree shall be recorded in the office of the recorder of deeds of each county where such real estate shall lie, in the deed book, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the name or names of the widow or children, and shall be registered in the survey bureau, or with the proper authorities empowered by law to keep a register of real estate, if any there be, in each of said counties. The charges for recording and registering shall be the same as are provided by law for similar services, and shall be paid out of the estate of the decedent.

NOTE.—This is a new clause, modeled on Section 2 (*h*) of the new Intestate Act.

SECTION 13 (*a*) All debts owing by any person within this state, at the time of his decease, shall be paid by his executors or administrators, so far as they have assets, in the manner and order following, viz.: 1. Funeral expenses, medicine furnished and medical attendance given during the last illness of the decedent, and servants' wages, not exceeding one year; 2. Rents, not exceeding one year; 3. All other debts, without regard to the quality of the same, except debts due to the commonwealth, which shall be last paid.

NOTE.—This is Section 21 of the Act of February 24, 1834, 1 Purd. 1103 (Section 22 of the Commissioners' Draft), which was founded on Section 14 of the Act of April 19, 1794, 3 Sm. L. 143.

(*b*) No executor or administrator shall be compelled to pay any debt of the decedent, except such as are by law preferred in the order of payment to rents, until six

months be fully elapsed from the granting of the administration of the estate.

NOTE.—This is Section 22 of the Act of 1834, 1 Purd. 1105, which was new in that act. The only change now made is to reduce the period from one year to six months.

Section 23 of the Act of 1834, 1 Purd. 1106, which was new in that act, reads: "Whenever the laws of the place in which was the decedent's domicile at the time of his death, contain any provisions whereby a preference may be given in the payment of debts, due to the citizens or residents thereof, as such, over the citizens of this state, the executor or administrator shall, in the disposition of such of the assets as may come into his hands, observe the like rules of preference in favor of the citizens or residents of such place, in the same manner as if such rules were hereby expressly enacted."

It is recommended that this reciprocity provision be repealed.

SECTION 14. Rents of real estate accruing after the death of the owner of such real estate, who shall die on or after the day on which this act shall go into effect, shall be assets for the payment of debts of such decedent whenever the personal estate shall be insufficient therefor. Whenever the personal estate of such decedent shall appear to be probably insufficient for the payment of debts, the orphans' court having jurisdiction of the accounts of the executor or administrator shall, upon application of any creditor of the decedent, or upon application of the executor or administrator, or of any other person interested, authorize and direct the executor or administrator to collect such rents for such period as the court shall fix. In such case, the executor or administrator shall have power to collect such rents by action at law, distress, or otherwise, as the decedent, in his lifetime, might have done as to rents of such real estate; and rents so collected shall be accounted for by the executor or administrator in his account of the personal estate of the decedent.

NOTE.—This is a new section. Land in Pennsylvania has been an asset for the payment of debts, at least since 1693; Laws Made at Philadelphia, c. 14; but until the land has been brought into administration either by the provisions of the will or by process of law, it belongs to the heir or devisee, who is consequently entitled to the rents; and even where the estate is insolvent an executor or administrator, and consequently the creditors, have no right to the interim rents: Fross's Appeal, 105 Pa. 258. This does not appear to be just, for the devisee or heir should have no right to anything until the debts are paid; and the Commissioners recommend this change in the law in order that this inequality may be corrected.

Furthermore the application of the rents during the period of administration to the payment of debts may in some cases obviate the necessity for a sale and perhaps a sacrifice of the real estate.

SECTION 15 (*a*) No debts of a decedent, including the cost of settlement of the estate, and the funeral expenses of the decedent, except as provided in clauses (*b*), (*g*) and (*h*) hereof, shall remain a lien on the real estate of such decedent longer than one year after the decease of such debtor, unless within said period an action for the recovery thereof be brought against the executor or administrator of such decedent, and such action shall be indexed, within said period, against the decedent and such executor or administrator, in the judgment index in the county in which such action is brought, and also in the county in which the real estate sought to be charged is situate, and be duly prosecuted to judgment; and then to be a lien only for the period of five years unless the same be revived by writ of scire facias against the decedent, his heirs, executors, or administrators, and the devisee, alienee, or owner of the land sought to be charged, in the manner now provided in the case of the revival of judgments.

The plaintiff may, at his election, join such surviving spouse and heirs, and the devisee, alienee, or owner of the land in such original action, in which event such action shall be indexed as aforesaid against all defendants so joined.

NOTE.—This is the first part of Section 1 of the Act of May 3, 1909, P. L. 386, 5 Purd. 5891, changed by reducing the period of the lien to one year instead of two, and by omitting, for the sake of clearness, the provisions as to debts not payable within the year, which are embodied in clause (*b*) of this section.

The Act of 1909 apparently repealed by implication Section 1 of the Act of June 14, 1901, P. L. 562, 1 Purd. 1106, which amended Section 1 of the Act of June 8, 1893, P. L. 392. The Act of 1893 supplied Section 24 of the Act of 1834, which was derived from Section 4 of the Act of April 4, 1797, 3 Sm. L. 296.

Section 5 of the Act of 1909, as amended by the Act of May 14, 1915, P. L. 475, 5 Purd. 5892, expressly repeals the Act of June 18, 1895, P. L. 197, 1 Purd. 1108, and Section 25 of the Act of February 24, 1834.

Before the Act of 1797, the lien was of indefinite duration. That act reduced it to seven years, the Act of 1834 to five years, and the Act of 1893 to two years. It is now recommended that the period be reduced to one year.

The words "and the funeral expenses of the decedent" have been inserted in order to settle the question whether such expenses are subject to the limitation of lien.

The last sentence is new, but declaratory of the law as laid down in the decisions.

There seems to be no reason why the lien should continue longer than one year. At present the personal estate of a decedent may be distributed at the expiration of one year, and if the procedure prescribed by law be followed, creditors lose their grasp, which corresponds to a lien, upon the fund distributed. It is perhaps proper that the lien should continue for a somewhat longer period of time as to real estate, but inasmuch as, according to the act recommended, the time allowed for the settlement of the personal estate is shortened to six months, the Commissioners recommend a corresponding abbreviation of the lien as to real estate. It will, of course, not be forgotten that a creditor may by appropriate proceedings under this section continue his lien for a longer period.

(*b*) No bond, covenant, debt or demand which is not payable within the said period of one year after the decease of the debtor, shall remain a lien upon the real estate of such decedent longer than one year after his

death, unless, within said period after his decease, a copy or particular written statement thereof be filed in the office of the prothonotary of the county where the real estate to be charged is situate, and be indexed against the decedent and the executor or administrator in the judgment index in the county where the executor or administrator resides and also in the county in which the real estate sought to be charged is situate; and then to be a lien only for the period of one year after the said bond, covenant, debt, or demand becomes due, unless within said period of one year an action for the recovery thereof be brought, indexed and duly prosecuted to judgment as provided in clause (*a*) of this section.

NOTE.—This is founded upon those provisions of Section 1 of the Act of May 3, 1909, omitted from clause (*a*).

(*c*) The provisions of clause (*a*) of this section shall be retroactive: *Provided*, *however*, That in case of any bond, covenant, debt, or demand that would be sooner barred, an action for the recovery thereof may be commenced within one year after the passage of this act, in manner as provided in clause (*a*) of this section.

NOTE.—This is Section 2 of the Act of June 14, 1901, P. L. 562, 1 Purd. 1108, modified in phraseology.

(*d*) It shall be the duty of the prothonotary of any county of this commonwealth, when an action is brought or statement is filed as aforesaid in his office, upon praecipe of the plaintiff or his attorney, to index the same against the decedent, his executor or administrator, and any other defendants therein, in the judgment index, as other liens are indexed, and to certify the same as liens in any certificate of liens that he may be required to make by virtue of his office. The prothonotary of any court in which said action may be brought, shall, upon request, furnish a copy of such praecipe, which, when duly certified, under the seal of the court, may be filed in any other county of this commonwealth in which the real estate sought to be charged with the debts of such

decedent may be situate, and when so filed shall be indexed, against the parties named therein, upon the judgment index in such county.

NOTE.—This is the latter part of Section 1 of the Act of May 3, 1909, P. L. 386, 5 Purd. 5891. The last part of the first sentence has been added to cover the provisions of the Act of June 15, 1871, P. L. 387, 4 Purd. 4060, in so far as they relate to this subject.

(*e*) No execution for the levy or sale of any real estate of any decedent shall be issued upon any judgment obtained in an action against his personal representatives under the foregoing clauses of this section unless the surviving spouse and heirs and the devisee, alienee or owner of the land sought to be charged, and the guardians of such as are minors shall have been made parties to such action, or, if they shall not have been so made parties, unless they shall be warned by a writ of scire facias issued against them on such judgment. If any of the parties reside outside of the county, the court may, by general rule or special order, direct service of such writ of scire facias by publication or otherwise.

NOTE.—This is a new clause, inserted to take the place of Section 34 of the Act of 1834, 1 Purd. 1113, now recommended for repeal, and declaratory of the law as laid down in the decisions from Murphy's Appeal, 8 W. & S. 165, Atherton *vs.* Atherton, 2 Pa. 112, and Walthaur *vs.* Gossar, 32 Pa. 259, 261, where Section 34 was termed "a bungling enactment," down to McCormick *vs.* Skelly, 201 Pa. 184.

(*f*) Judgments which were not liens on the real estate of the decedent by entry or revival, by due process of law, within five years prior to the death of such decedent, shall not be revived as liens of record against real estate by the death of the defendant, but shall rank and be treated simply as ordinary debts not of record, and the lien thereof shall be continued after the expiration of one year from the decease of such debtor only by writ of scire facias to revive, issued within one year after the death of the decedent, indexed as provided in clauses (*a*) and (*d*) of this section, and duly prosecuted to judgment;

and then to be a lien only for the period of five years unless the same be revived by writ of scire facias as provided in clause (*a*) of this section.

NOTE.—This is Section 2 of the Act of May 3, 1909, P. L. 386, 5 Purd. 5892. It has been altered by inserting the words "of record" in line 4, and the word "not" in line 6, the latter word having been omitted, apparently by inadvertence, from the Act of 1909. The last part of the section has been rewritten, in order to make it plain that such judgments are liens as debts not of record for one year only, and that the mode of continuing the lien is by sci. fa. and not by action of assumpsit on the judgment, as was apparently provided by the Act of 1909.

(*g*) All judgments which at the time of the death of a decedent shall be liens on real estate owned by said decedent at the time of his death, or on real estate which shall have been conveyed by deed not duly recorded during his lifetime, shall continue to bind such real estate during the term of five years from his death, although such judgments be not revived by scire facias or otherwise after his death. Such judgments shall, during such term, rank according to their priority at the time of such death, and after the expiration of such term such judgments shall not continue liens on the real estate of such decedent unless revived by scire facias or otherwise, according to the laws regulating the revival of judgments. Any judgment against such decedent which may be a lien upon real estate sold or aliened by such decedent during his life may be revived by writ of scire facias, according to law; and, for the purpose of any such revival, the writ of scire facias may be issued in the name of such decedent, with the same force and effect as if it were issued in the name of his executors, administrators, or legal representatives; but, before any judgment shall be entered thereon, the legal representatives shall be made parties defendant, and a scire facias shall be served on such legal representatives.

NOTE.—This is Section 3 of the Act of May 3, 1909, P. L. 386, as amended by the Act of May 14, 1915, P. L. 475, 5 Purd. 5892. See Brubaker's Estate, 59 Pa. Superior Ct. 109.

(*h*) Nothing contained in this section shall in any way affect or impair the lien of any mortgage given and executed and duly recorded during the lifetime of any decedent; but the bond secured by such mortgage, except as to real estate on which said mortgage is a lien, shall be subject to all the provisions hereof.

NOTE.—This is Section 4 of the Act of May 3, 1909, P. L. 386, 5 Purd. 5892.

Section 52 of the Act of July 16, 1842, P. L. 388, 1 Purd. 1109, provides, in part: "In cases of intestacy, where the real estate of the decedent shall be sold under an order of the orphans' court for distribution, before the expiration of five years from the death of the intestate, the administrators are authorized to apply the proceeds of such sale, while in their hands, to the payment of debts and claims owing by the decedent, for which there may not be other assets in hand: *Provided*, That if, before any such payment be made, the distributees of the proceeds of such real estate, their guardians or agents, shall give written notice to such administrators, objecting to such payment, then and in such case, this clause shall not justify the same, unless such real estate were or may be otherwise legally liable to such payment." The omitted portions of the section related to past cases. See 2 P. & L. Dig. of Laws, col. 2697, for the full text.

The meaning and purpose of the section are not clear, nor do the decisions make them so. It is recommended that the section be repealed.

(*i*) No execution for the levy or sale of any real or personal estate of any decedent shall be issued upon any judgment obtained against him in his lifetime, unless his personal representatives have been first warned by a writ of scire facias to show cause against the issuing thereof, notwithstanding the teste of such execution may bear date antecedently to his death.

NOTE.—This is part of Section 33 of the Act of 1834, 1 Purd. 1113, which corresponded, as to the first sentence, to Section 34 of the Commissioner's Draft, and was new in the Act of 1834.

(*j*) In all cases where property, real or personal, of a decedent is sold upon an execution, and more money raised than is sufficient to pay off liens of record, the balance shall be paid over to the executor or administrator for distribution; but before any such payment shall be made, such executor or administrator shall give bond, to the satisfaction of the court, conditioned for the legal distribution of such money: *Provided always*, That such money shall be distributed as the real estate of which it is the proceeds would have been.

NOTE.—This is the remainder of Section 33 of the Act of 1834. See Fidelity Insurance Trust & S. D. Co. *vs.* Sampson, 209 Pa. 214.

(*k*) In every case of an execution against the executors or administrators of a decedent, whether founded upon a judgment obtained against such decedent in his lifetime, or upon a judgment obtained against them in their representative character, if it shall be made to appear, to the satisfaction of the court issuing such execution, that there is reason to believe that the personal assets and the rents of real estate are insufficient to pay all just demands upon the estate, such court shall thereupon stay all proceedings upon such execution, until the executors or administrators shall have made application to the proper orphans' court for the sale of the real estate of the decedent, or for the apportionment of the assets, or both, as the case may require.

NOTE.—This is Section 35 of the Act of 1834, 1 Purd. 1114, with the addition of the words "and the rents of real estate," to conform to Section 14 of this draft.

This and the next section were new in the Act of 1834.

(*l*) It shall be competent for the court, in the cases aforesaid, on application of the plaintiff in such judgment, or of any other person interested as heir, devisee or otherwise, to order the executors or administrators to make application to the orphans' court for the purpose as is hereinbefore mentioned, and to enforce such order by attachment.

NOTE.—This is Section 36 of the Act of 1834, 1 Purd. 1114.

SECTION 16 (*a*) Whenever it shall satisfactorily appear to the executor or administrator that the personal estate of the decedent, together with the rents of real estate, is insufficient to pay all just debts and the expenses of the administration, he shall proceed, without delay, in the manner hereinafter provided, to sell or mortgage, under the direction of the orphans' court having jurisdiction of his accounts, so much of the real estate as shall be necessary to supply the deficiency.

NOTE.—This is section 20 of the act of February 24, 1834, 1 Purd. 1116. The first part requires executors and administrators to proceed to sell real estate for payment of debts. The last clause was copied from section 21 of the act of April 19, 1794, 3 Sm. L. 143.

The provision as to rents is new, and is inserted because of the provision of Section 14 of the present draft, making rents assets for the payment of debts. "In the manner hereinafter provided" is substituted for "In the manner provided by law." "Or mortgage" is inserted after "to sell."

At the end, the following words are omitted: "and such real estate so sold shall not be liable in the hands of the purchaser for the debts of the decedent." This is covered by clause (*o*) of the present section of the draft.

(*b*) The orphans' court which possesses jurisdiction of the accounts of an executor or administrator shall have power to authorize a sale or mortgage of real estate by such executor or administrator in the following cases, viz.:—

1. On the application of the executor or administrator, setting forth that the personal estate and the rents of real estate of the decedent are insufficient for the payment of debts.

NOTE.—This is the introductory part, with clause I, of section 31 of the act of March 29, 1832, 1 Purd. 1116. The words "or guardian" have been omitted after

"administrator" in the second line. The provision as to rents has been inserted for the reason stated in the last preceding note.

At the end, the following words have been omitted: "and maintenance and education of his minor children, or for the purpose of paying the debts alone." The subject of maintenance and education of children is covered by the revised Price Act.

For the same reason, clause III of section 31 of the act of 1832 is now omitted. That clause reads: "On the application of a guardian, setting forth that the personal estate of the minor is insufficient for his maintenance and education, or for the improvement and repair of other parts of his real estate, or that the estate of said minor is in such a state of dilapidation and decay, or so unproductive and expensive, that it would be to the interest and benefit of said minor, in the judgment of said court, that the said estate should be sold; and the orphans' court of the county wherein any such real estate may be situate, shall have the same authority to direct a sale in this latter case as in the cases particularly mentioned in section 32 of this act."

The Commissioners of 1830 reported that, in section 31 (section 32 of their draft), they had collected all existing provisions giving jurisdiction to authorize a sale of real estate by an executor, administrator or guardian. Clause I was derived from section 19 of the act of April 19, 1794, 3 Sm. L. 143, amended by the act of April 8, 1826, P. L. 255. Clause II was founded on section 2 of the act of April 1, 1811, P. L. 198. Clause III was derived from section 10 of the act of April 7, 1807, P. L. 155.

2. On the application of such executor or administrator, or of any creditor of the decedent, setting forth that on the final settlement of the administration account, it appears that the personal assets together with the rents of real estate of the decedent are insufficient to pay the balance appearing to be due from the estate of such decedent, either to the accountant or creditors.

NOTE.—This is clause II of section 31 of the act of March 29, 1832, 1 Purd. 1118, with the substitution of "creditor of the decedent" for "person interested" in the second line, and the addition of the provision as to rents of real estate.

(*c*) No authority for the sale or mortgage of real estate, for the payment of debts of a decedent, shall be granted until the executor or administrator shall have exhibited to the court having jurisdiction of his accounts a true and perfect inventory and conscionable appraisement of all the personal estate whatsoever of the decedent, together with a full and correct statement of all the real estate of such decedent, wherever situated, which has come to his knowledge, and of the rental value of such real estate; and also a just and true account, upon oath or affirmation, of all the debts of the decedent which have come to his knowledge.

NOTE.—This is section 33 of the act of March 29, 1832, 1 Purd. 1118, which, except for the provision as to a statement of the real estate, made no change in the law, and was largely founded upon section 20 of the act of April 19, 1794, 3 Sm. 143.

It is now changed by omitting the references to guardians and minors, by omitting the provision as to bonds, in view of the general section on that subject in this draft, and by omitting, as unnecessary or obsolete, the proviso, which reads as follows: "Provided, That no real estate contained in any marriage settlement shall, by virtue of this act, be sold or disposed of, contrary to the form and effect of such settlement; and that the mansion house, or most profitable part of the estate, shall be reserved to the last."

The provision as to rental value is new.

(*d*) When a mortgage authorized under the provisions of this section shall fall due or shall be about to fall due, the orphans' court which authorized such mortgage may, on the application of the executor or administrator or of any party in interest, and although the period of the lien of the decedent's debts may have expired at the time of such application, authorize the refunding of such mortgage and the making of a new bond and mortgage, the proceeds of which may be used for the payment and satisfaction in whole or in part of the said existing mortgage and necessary expenses. Such new mortgage may be for such period and on such terms as to said court shall seem advisable.

NOTE.—This clause is introduced to cover a case which has arisen in practice, and in which the jurisdiction of the courts is at present doubtful.

(*e*) In all cases where an application shall be made to the court for a decree authorizing the sale or mortgage of real estate under the provisions of this section, the court may appoint a suitable person as master to investigate the facts of the case, and to report upon the expediency of granting the application, and the amount to be raised by such sale or mortgage; and upon such report being made, the court may decree accordingly.

NOTE.—This is section 34 of the act of 1832, 1 Purd. 1119, which was new in the act of 1832. A master is now provided for instead of one or more auditors, and the phraseology has been modified.

(*f*) In all cases where the carrying out of any decree of the orphans' court under the provisions of this section shall involve the receipt of money by the person carrying it out, the court shall direct the person acting under the decree to file a bond to the commonwealth in a sufficient amount conditioned for the proper application of all moneys to be received, which bond shall inure to the benefit of all parties interested and be executed by two individual sureties or by one corporate surety, approved by the court, and no such decree shall be executed until such bond, with sureties as may be required, shall be filed: *Provided*, That where a corporation, duly authorized by law, shall be designated to carry out any such decree, the court may, in lieu of security as aforesaid, permit such corporation to enter its own bond without surety.

NOTE.—This section is founded on Section 43 of the Act of February 24, 1834, 1 Purd. 1122, the proviso to Section 4 of the Price Act, 4 Purd. 4022, and Section 5 of the Act of April 3, 1851, 1 Purd. 1120. The proviso is new.

(*g*) Whenever, by the provisions of this section, it shall be lawful for the court to order the public sale of real

estate, public notice of such sale shall be given by the person who is to make the sale, once a week for a period of three weeks before the day appointed therefor, by advertisement in at least one newspaper published in the county, if there be one, or, if there be none, then in an adjoining county; and in all cases, notice shall also be given by handbills, one of which shall be posted at a conspicuous place on the real estate proposed to be sold, and at least three of which shall be posted at three of the most public places in the vicinity of such estate.

NOTE.—This is section 54 of the act of March 29, 1832, 1 Purd. 1121, with the omission of the word "orphans'" in line 2, and the words, "executor, administrator or guardian, as the case may be," the substitution of "once a week for a period of three weeks" for "at least twenty days," and the substitution of "person" in line 4, and the insertion of the provision as to posting on the premises. The section was new in the Act of 1832.

(*h*) Whenever, under the provisions of this section, the court has power to authorize or confirm a sale of real estate, the same may be made upon such terms as the court shall approve, all unpaid purchase money to be secured on the premises by mortgage.

NOTE.—This is derived in part from section 4 of the Price Act, 4 Purd. 4022, and is intended to supersede Section 1 of the Act of March 22, 1859, P. L. 207, 3 Purd. 3386, relating to sales on credit, which is recommended for repeal.

(*i*) All deeds or mortgages executed in pursuance of any decree of the court under the provisions of this section may be acknowledged before any officer or person now or hereafter authorized by the laws of this commonwealth to take the acknowledgment of deeds and other instruments of writing to be recorded therein.

NOTE.—This clause is designed to make the law relating to the acknowledgment of instruments executed under the authority of the section similar to the general law prevailing in such cases. There seems to be no reason now for making any special distinction as to the acknowledgment of such instruments.

(*j*) 1. In all cases where the sale of real estate shall be made by an executor or administrator under an order of, or confirmed by, the orphans' court, or where the making of a mortgage by such executor or administrator shall be authorized by said court, under the provisions of this section, and the letters testamentary or of administration shall be revoked, or the executor or administrator shall be removed by the court, or shall die, or become insane, or otherwise be incapable, before a conveyance is made to the purchaser, or before a mortgage is executed and delivered, it shall be lawful for the successor of such executor or administrator, having first given security, to be approved by the said court, for the faithful appropriation of the proceeds of such sale or mortgage, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale, or to execute and deliver said mortgage. If there shall be no such successor who shall have given security as aforesaid, the said court shall have power, on petition of the purchaser, to direct the clerk of the court to execute and deliver to the purchaser the necessary deed of conveyance, on his full compliance with the terms and conditions of sale, paying into court the moneys payable, and executing and delivering to the clerk any bond and mortgage required by the said terms and conditions, which moneys and bond and mortgage shall remain subject to the disposition of the court; or, where the making of a mortgage by an executor or administrator shall be authorized by said court, the court, under the circumstances aforesaid, shall have power to direct the clerk of the court to execute and deliver such mortgage. The like proceedings may be had where an executor or administrator shall neglect or refuse to execute and deliver such deed or mortgage for the space of thirty days after due notice of an order of the court requiring him to execute and deliver the same.

NOTE.—This is founded on section 47 of the act of March 29, 1832, 1 Purd. 1121 (section 35 of the Com-

missioners' Draft), which was derived from the act of April 2, 1802, 3 Sm. L. 499.

In the present draft, a provision as to revocation of letters has been added, the section has been extended so as to include mortgages, and the provision that deeds made in pursuance of the section shall vest the property as effectually as if made by the persons who sold the property has been omitted, being covered by a later clause. The words "the said court shall have power" have been substituted for "it shall be the duty of the said court," and "bond and mortgage" for "sureties."

The words "within three months after such sale" have been omitted before "there shall be no such successor," since there seems to be no reason why proceedings should be delayed for three months.

Section 1 of the act of May 22, 1878, P. L. 83, 4 Purd. 4035, provides for cases where the fiduciary dies before execution of a deed, and authorizes the court to direct the clerk to deliver a deed, without limiting this authority to cases where there is no successor. It is recommended that this be repealed, as superseded by the provisions of the section as redrafted.

2. In all cases where the sale of real estate shall be made by co-executors or co-administrators under an order of, or confirmed by, the orphans' court, or where the making of a mortgage by such co-executors or co-administrators shall be authorized by said court, under the provisions of this section, and one or more of such co-executors or co-administrators shall be removed by said court, or shall die, or become insane, or otherwise be incapable, before a conveyance is made to the purchaser, or before such mortgage is executed and delivered, said court may, upon the facts being made to appear by petition duly verified, authorize the surviving or remaining executor or executors, administrator or administrators, to execute and deliver to the purchaser a deed of conveyance for the real estate so sold, on the purchaser's full compliance with the terms and conditions of sale, or to execute and deliver such mortgage.

NOTE.—This is section 1 of the act of May 1, 1861, P. L. 431, 1 Purd. 1123, amended so as to conform to the changes

made in the last preceding clause, and so as to provide for an order of the court.

3. Where authority is or shall be given by decree of any orphans' court to executors or administrators to sell real estate, under the provisions of this section, and any of such executors or administrators shall have died, been removed, become insane or otherwise be incapable, or cease to act, before a sale is effected, in all such cases, said court may, upon the facts being made to appear by petition duly verified, authorize the surviving or remaining executor or executors, administrator or administrators to effect such sale with as full effect in all particulars, as if effected or executed by the executors or administrators in office at the time the sale was originally decreed.

NOTE.—This is the latter part of section 2 of the act of May 1, 1861, P. L. 431, 1 Purd. 1123. The first part of that section provides for cases where sale had been made before the passage of the act; this seems unnecessary now.

The part which is retained provides for cases where any trustee "or other person" authorized to sell real estate had died, etc.; and the last line reads "persons acting in the trust, or other office, at the time a sale was originally decreed." The meaning of the words "other person" and "other office" is not clear. They probably refer to executors and administrators, and have been so considered in the present draft. The provision for an order of court is new.

The last sentence of the section is omitted here, being covered by a subsequent clause.

4. Every sale made, and every deed or mortgage executed and delivered in pursuance of, and agreeably to the provisions of this section shall vest the property therein described in the grantee or mortgagee, as fully and effectually as if the same had been made, executed and delivered by all the executors or administrators to whom the authority to sell or mortgage was originally given.

NOTE.—This is derived from parts of section 47 of the act of March 29, 1832, 1 Purd. 1121, and section 2 of the act of May 1, 1861, P. L. 431, 1 Purd. 1123. The provisions are here extended to mortgages.

5. In all cases of sales or mortgages under the order of, or confirmed by the orphans' court, under the provisions of this section, the title of the purchaser or mortgagee shall not be affected by the subsequent revocation of the letters testamentary or of administration of the executor or administrator making such sale or mortgage, or by the subsequent removal of the executor or administrator making such sale or mortgage.

NOTE.—This is the first part of section 16 of the act of April 9, 1849, P. L. 527, 1 Purd. 1123, extended to include mortgages, with the substitution of "or" for "and" before "confirmed," and with the addition of the last part, beginning "or by the subsequent removal."

In the first line, the words "bona fide," before "sales," have been omitted as unnecessary.

The last part of that section provides that purchasers at orphans' court sales shall have a right to proceed to obtain possession in the same manner as is provided by law as to purchasers at sheriffs' sales. This seems unnecessary now, in view of the act of April 20, 1905, P. L. 239, 5 Purd. 6100, providing a proceeding for the obtaining of possession by "purchasers at judicial sales of real estate in this commonwealth."

6. Whenever, in pursuance of proceedings in the orphans' court of any county under the provisions of this section, any person therein described as an executor or administrator shall grant and convey or mortgage any real estate, in which proceedings security shall be duly entered by him or her, under the order or decree of the court, no irregularity or defect in his or her original appointment, or the absence of any proper qualification in respect thereto, shall affect the title of the grantee or purchaser, or the liability of the sureties, but the same shall be as valid in all respects as if such irregularity or defect had not existed.

NOTE.—This is section 1 of the act of April 28, 1876. P. L. 50, 4 Purd. 4033, extended to include mortgages, The words "or personal" have been omitted before "estate" in line 5, and the words "liability of the sureties" substituted for "security so entered," before "but the same shall be as valid."

The proviso, excluding adjudicated and pending cases, has also been omitted.

(*k*) Whenever any orphans' court, having jurisdiction under this section to decree a sale or mortgage of real estate, shall issue its order to any executor or administrator to sell or mortgage such real estate, and shall, in any case within its jurisdiction, give authority to any executor or administrator to bid at such sale, and shall confirm the sale to such fiduciary, or shall authorize the making of such mortgage to any executor or administrator, the said court may make an order directing its clerk to execute a deed or mortgage, as the case may be, for said real estate to such purchaser or mortgagee, who shall give security and shall account for the amount of said purchase money or mortgage money, in the settlement of his accounts, to said court.

NOTE.—This is section 2 of the act of May 22, 1878, P. L. 83, 4 Purd. 4035, modified so as to cover mortgages as well as sales of real estate, and with some changes in phraseology.

Section 3 of the act of 1878 validated conveyances theretofore executed by clerks.

Section 45 of the act of February 24, 1834, 1 Purd. 1122, providing for refunding bonds by kindred of the decedent on distribution of the proceeds of a sale of real estate, is recommended for repeal, Section 41 of the act, providing for refunding bonds upon distribution of the personal estate, having been omitted in the present draft.

(*l*) 1. When the real estate, with respect to which application shall be made to the orphans' court having jurisdiction of the accounts of the executor or administrator, in cases of sales or mortgages for the payment of debts of decedents under clause (*b*) of this section, is situated in the same county, the said court may order the sale or mortgage of such part or so much of such real estate as to them shall appear necessary. When the real estate is situated wholly in another county or counties, and the orphans' court to which such application shall be made shall be satisfied of the propriety of a sale or

mortgage of some portion of such real estate not within their jurisdiction, it shall be lawful for such court to make a decree authorizing the raising of so much money as the said court may think necessary, from real estate situated in such county or counties as they may designate; and thereupon it shall be the duty of the orphans' court of the county wherein the real estate so designated is situated, upon the petition of such executor or administrator, to make an order for the sale or mortgage, as they shall think expedient, of so much and such parts of such real estate as shall, in their opinion, be necessary to raise the specified sum; and such executor or administrator shall in all cases make return of his proceedings, in relation to such sale or mortgage, to the orphans' court of the county in which the real estate so sold or mortgaged lies: *Provided*, That where the orphans' court to which such application shall be made shall make a decree authorizing the raising of money from real estate which is wholly without the county where such application shall be made and is divided by a county line, the further proceedings shall be in the orphans' court of the county where the mansion house is situated, or, if there be no mansion house, in the county where the principal improvements are, or, if there be no improvements, in either county.

NOTE.—This is section 32 of the act of March 29, 1832, 1 Purd. 1118, which was new in that act. Some changes have been made in phraseology. The words "or in the same and another county or counties" have been omitted after "When the real estate is situated wholly in another county or counties" in the second sentence, the case of real estate divided by a county line being covered by the proviso and by subsequent clauses. The provision as to confirmation of sale has been omitted, being covered by a general section below. The proviso is new.

It has been held that section 32 of the act of 1832 was not repealed by the Price Act: Burkhardt's Appeal, 1 Mona. 474.

2. When application shall hereafter be made to the orphans' court having jurisdiction of the accounts of

any executor or administrator for leave to sell or mortgage the real estate of a decedent or any part of the same for the payment of debts of such decedent under the provisions of this section, and any part of said real estate is situated partly in the county where said application shall be made and partly in one or more other counties, by reason of a county line or lines running through the same, the said court shall have power to order and direct the sale or mortgage of the whole or any part of said tract of land, irrespective of the county boundary lines, and such sale or mortgage shall be as effectual to pass the title of such real estate to the purchaser or mortgagee as if the whole of said tract of land had been within the boundaries of the county having jurisdiction of the accounts of the executor or administrator. Notices of said sale or mortgage, as required by this section, shall be given in all the counties in which the land is situated, and a certified copy of all proceedings in connection with said sale or mortgage shall be filed in the orphans' court of each county in which said land is situated. Any mortgage taken by such executor or administrator to secure the purchase money, or any part thereof, shall be duly recorded in each of the counties in which said lands lie, as now required by law.

NOTE.—This is a combination of section 1 of the act of June 4, 1883, P. L. 65, 1 Purd. 1121, relating to sales by executors or administrators, and section 1 of the act of May 21, 1901, P. L. 272, 3 Purd. 3387, relating to sales by guardians. The word "proper" has been omitted before "orphans' court" in the second line. The references to confirmation and return of sale and to judgments and other obligations have been omitted.

The act of June 7, 1901, P. L. 513, 1 Purd. 1123, validating previous sales, may be allowed to stand.

(*m*) 1. The orphans' courts of the several counties of this commonwealth, in all cases where, under the provisions of this section, such courts have power to order the sale of real estate, may authorize or direct a private

sale, if, in the opinion of the court, under all the circumstances, a better price can be obtained at private than at public sale, as where the interest shall be undivided, or for any other sufficient cause.

NOTE.—This is section 1 of the act of May 9, 1889, P. L. 182, 1 Purd. 1121, altered by substituting "under the provisions of this section" for "under existing laws," by omitting, after "the sale of real estate" the words "for the payment of the debts of decedents and for other purposes," and by substituting "authorize or direct" for "decree and approve."

Before this act, the court had no jurisdiction to decree a private sale for the payment of debts: Miller *vs.* Spear, 21 W. N. C. 554; McPherson *vs.* Cunliff, 11 S. & R. 422.

Section 2 of the act of May 21, 1901, P. L. 272, 4 Purd. 4034, authorizing private sales "for the payment of debts of a ward and for other purposes," is also covered by the present section and should be repealed. What was meant by sales "for the payment of debts of a ward" is not clear, no previous act having authorized such sales.

2. Before authorizing or directing any private sale of real estate for payment of debts of a decedent, public notice thereof shall be given by advertisement printed in at least one newspaper, published in the county where such real estate is situated, once a week for a period of three weeks prior to the date fixed by such order for authorizing or directing such sale; and also written or printed notices, one of which shall be posted at a conspicuous place on the real estate proposed to be sold, and at least three of which shall be posted at three of the most public places in the vicinity of such real estate; and, before authorizing or directing such sale, the court shall require proof, by affidavit to be filed in the proceeding, that notice as aforesaid has been given. Such notice shall specify the location and description of the real estate proposed to be sold, the name of the proposed purchaser and the price agreed to be paid.

NOTE.—This is founded on sections 1 and 2 of the act of June 9, 1911, P. L. 724, 6 Purd. 7037, and the amendment of June 12, 1913, P. L. 470, 6 Purd. 7037.

The changes made are to substitute "authorizing or directing" for "authorizing, decreeing, or approving," to omit the provision for advertisement in the legal periodical, to change "for at least twenty days" to "once a week for a period of three weeks," and to add the last sentence.

3. On the day fixed by such order and notice for authorizing or directing such private sale, any creditor of such decedent, or party interested as heir, devisee or intending purchaser, or any legatee whose legacy is, by the express terms of the will, or by law, charged on such real estate, may appear and object to such private sale on account of the insufficiency of the price, and, if such objection be sustained, may offer to give or pay a substantial increase for such property, and the court, at its discretion, may thereupon authorize or direct such sale, or refuse to authorize or direct the same, and accept any substantially increased offer, and may authorize the sale of such property to such new bidder upon compliance with the conditions of sale and giving such security as shall be directed by the court; or, such creditor, party interested or legatee may appear as aforesaid and object to such sale on any legal or equitable grounds: *Provided*, That nothing herein contained shall be construed to affect the existing law with respect to objections to public sales.

NOTE.—This is founded on section 3 of the act of June 9, 1911, P. L. 724, 6 Purd. 7037.

The provision as to legacies charged on land is new, as is the provision for objection to the sale on grounds other than insufficiency of price. Several changes have also been made in the phraseology.

Section 4 of the act of 1911 (6 Purd. 7037) validated sales previously made under the act of 1889, and need not be re-enacted. The same is true of the acts of April 4, 1901, P. L. 66, 1 Purd. 1121, and April 10, 1915, P. L. 112, 6 Purd. 7289, and the act of July 21, 1913, P. L. 871, 5 Purd. 5893, validating sales and mortgages made under order of the orphans' court.

(*n*) All public sales of real estate under the provisions of this section shall be subject to confirmation by the court; but in the case of private sales authorized or directed under the provisions of this section, no return or confirmation shall be necessary.

NOTE.—This is a new section, introduced in order to make the practice uniform and free from doubt.

Where authority is given to a fiduciary to make public sale of real estate, obviously the fiduciary should make return of his doings to the court and have the sale confirmed; but the same reason would not apply where, as in the case of a private sale, the price and terms of sale and the name of the purchaser appear in the petition. The court having approved the sale and directed that it be carried out, it seems unnecessary for the fiduciary to report to the court and obtain a confirmation of what he was instructed to do.

(*o*) All public or private sales of real estate under the provisions of this section shall have the effect of judicial sales as to the discharge of liens upon the real estate so sold: *Provided*, That the court may decree a sale of the real estate freed and discharged from the lien of any mortgage otherwise preserved from discharge by existing law, if the holder of such mortgage, by writing filed in said court, shall consent to the sale being so made.

NOTE.—The first part is declaratory of the existing law. As to the effect of private sales for the payment of debts in discharging liens, see O'Brien *vs.* Wiggins, 14 Pa. Superior Ct. 37.

A public sale of real estate under the provisions of this act may well stand on the same footing as a sheriff's sale so far as the discharge of record liens is concerned; and a private sale of real estate for the payment of debts is by the terms of this section subject to equivalent formalities of procedure.

The proviso is derived from Section 2 of the Act of May 19, 1893, P. L. 110, 1 Purd. 1185.

(*p*) Whenever a public or private sale of real estate shall be authorized or directed by any orphans' court under the provisions of this section, the person or persons purchasing the real estate so sold and taking title thereto in pursuance of the decree of the court, shall take such title free and discharged of any obligation to see to the application of the purchase money.

NOTE.—This is a new section, modeled upon Section 1 of the Act of June 10, 1911, P. L. 874, 7 Purd. 7703, which related only to sales under testamentary powers, and is the basis of Section 30 of the present draft. The Act of 1911 superseded Section 19 of the Act of February 24, 1834, P. L. 70, 1 Purd. 1122, which provided for payment of purchase money into court.

SECTION 17 (*a*) It shall and may be lawful for any executor, administrator, trustee, or any party interested in the real estate of any decedent, to present a petition to any court having jurisdiction of the settlement of such estate, setting forth all the particulars, and also that there are just and reasonable grounds for believing that said decedent left no debts not of record, and that it is desirable to have the real estate of said decedent relieved from any lien now given by law for such debts.

NOTE.—This is Section 2 of the Act of June 8, 1893, P. L. 392, 1 Purd. 1108, except that, in the fourth line, "a petition" is substituted for "his, her or their petition."

(*b*) Said court may hear and determine the same, or refer such petition to a master, whose duty it shall be to inquire diligently into the facts and circumstances alleged in such petition, and report the same to said court. The court may in its discretion direct such notices to be given of such application, by publication or otherwise, as it may deem necessary.

NOTE.—This is Section 3 of the Act of June 8, 1893, P. L. 392, 1 Purd. 1108, modified by omitting in the first line, after "court," the words "having jurisdiction as aforesaid;" by omitting in the same line, after "same," the words "and shall have power" and inserting "or;"

by omitting "any" before "such petition" in the fourth line; by omitting "said" before "court" in the fifth line; and by omitting "either" after "application" in the sixth line.

(*c*) It shall be the duty of said court, upon being fully satisfied as to the truth and justice of the matters alleged in any such petition, to decree that the real estate of such decedent shall be held and enjoyed free and clear of any lien of debts not of record of said decedent, and said court shall require the person or persons entitled to said real estate to enter bond, in such form and amount, and with or without sureties, as the court may in its discretion determine, conditioned for the payment by such person or persons of an amount sufficient to pay any debts of the decedent not of record, which may thereafter be proved and which would have been liens upon said real estate but for such decree.

NOTE.—This is Section 4 of the Act of 1893, 1 Purd. 1108, modified by omitting "and application" after "petition," "any" before "such decedent," and "and direct" after "decree," and by adding the provisions in regard to bonds. Section 5 is a general repealer.

SECTION 18 (*a*) Where any person shall have, by contract in writing, agreed to sell and convey any real estate in this commonwealth, and died seised or possessed thereof, or of an undivided interest therein, or where any person shall have purchased, in writing, any real estate in this commonwealth and died without paying the purchase money therefor, it shall be lawful in all such cases for the executor or administrator of the deceased vendor, or for the vendor when the purchaser may have died, or for the purchaser of such real estate, or, when he has died, for his executor or administrator, or for any other person interested in such contract, to petition the orphans' court having jurisdiction of the accounts of the executor or administrator of the deceased vendor or the deceased purchaser, as the case

may be, setting forth the facts of the case. After due notice of such petition to the persons interested, according to the nature of the proceeding, to appear in such court, on a day certain, and answer the petition, such court shall have power, if the facts be sufficient in equity, no sufficient cause being shown to the contrary, to decree specific performance of such contract according to the true intent and meaning thereof.

NOTE.—This is Section 1 of the Act of April 28, 1899, P. L. 157, 1 Purd. 743, with some slight changes in phraseology, and the insertion, in the fourth line, of the words "or of an undivided interest therein," to cover the provisions of Section 1 of the Act of February 8, 1848, P. L. 27, 1 Purd. 742.

Section 1 of the Act of 1899, which apparently supplied Section 15 of the Act of February 24, 1834, P. L. 75, 1 Purd. 741, extended the remedy to cases of deceased purchasers and allowed the petition to be filed by any person interested in the contract.

Sections 15 to 18 of the Act of 1834 were founded on the Acts of March 31, 1792, 3 Sm. L. 66; March 12, 1804, P. L. 271; and March 10, 1818, P. L. 183, which provided a remedy in the common law courts.

(*b*) The aforesaid remedy, by petition to the orphans' court, shall hereafter be exclusive.

NOTE.—This is a new provision, declaratory of the existing law.

There was some conflict in the early opinions, and in Mussleman's Appeal, 65 Pa. 480, it was remarked by Mr. Justice Agnew that it was perhaps unfortunate that the supreme court, in Wetherill *vs.* Seitzinger, 9 W. & S. 177, and in an unreported case, had decided that the Act of 1834 did not oust the jurisdiction of the common pleas under the Act of 1792.

The Commissioners of 1830 reported: "We have transferred the jurisdiction and power of giving relief in all cases within the act, from the common pleas to the orphans' court. The constitution and process of the latter tribunal seem to us peculiarly to fit it for all questions of chancery jurisdiction, and particularly for cases like that provided for in these sections, where various parties may be interested and various inquiries may be

necessary, for the best prosecution of which, the powers of the common law courts are entirely inadequate. The course of proceeding suggested is believed to have the advantage of greater simplicity, and at the same time of greater efficacy than that at present authorized."

This was a clear indication that the Commissioners of 1830 were of opinion that the earlier acts should be repealed.

The matter is now set at rest by the decision of the supreme court, in Gable *vs.* Whiteside, 242 Pa. 188, that the jurisdiction of the orphans' court is exclusive. The present Commissioners, therefore, recommend that the acts giving jurisdiction to the court of common pleas be expressly repealed.

The acts in question are as follows: March 31, 1792, 3 Sm. L. 66, Sections 1-3, 1 Purd. 738, 739; March 12, 1804, P. L. 271, Section 1, 1 Purd. 739; March 10, 1818, P. L. 183, Sections 1-3, 1 Purd. 740, 741; February 5, 1821, P. L. 25, Section 2, 1 Purd. 739; and April 3, 1851, P. L. 305, Section 6, 1 Purd. 741.

(*c*) When any petition for the specific performance of any such contract shall have been filed, it shall be the duty of the prothonotary of the court of common pleas of the county in which such real estate or any part thereof shall lie, on being certified by the clerk of the orphans' court in which such petition shall have been filed of the fact of such filing, to enter the same upon the judgment index under the name of the respondent in such petition, and to certify the same as lis pendens in any certificate of search that he may be required to make by virtue of his office.

NOTE.—This is a new provision, modeled upon Section 1 of the Act of June 15, 1871, P. L. 387, 4 Purd. 4060. See also the Act of April 22, 1856, P. L. 532, Section 2, 2 Purd. 1303.

This provision seems preferable to that of Section 2 of the Act of April 28, 1899, P. L. 157, 1 Purd. 743, which was a copy of Section 17 of the Act of 1834, 1 Purd. 742, and reads as follows: "The order or decree of the orphans' court for the specific performance of any such contract, in the cases hereinbefore mentioned, being certified by the clerk of such court, under the seal thereof, may be recorded in the office for recording deeds in the county

where such real estate is situate, in like manner as deeds are recorded, and with the same effect:"

It is recommended that this section be repealed, since, if the decree is followed by a deed, which will itself be recorded, the recording of the decree seems unnecessary. The indexing of the petition, as provided by clause (*c*), supra, will be more satisfactory.

(*d*) When such order or decree for the specific performance of any such contract shall have been made, and the purchase money paid or secured to be paid according to the terms of such contract, it shall be the duty of the vendor, or, when he shall be deceased, of his executors or administrators, to execute such deed of conveyance as shall be directed by the court in conformity with the intention of such contract. Such deed, being so made by such executors or administrators, shall have the same force and effect to pass and vest the estate intended as if the same had been executed by the decedent in his lifetime. In the case of an order or decree for specific performance by the executors or administrators of a deceased vendee, the court shall enter a decree for payment by such executors or administrators, out of the estate of their decedent, of the amount of purchase money, with interest if any, which decree may be enforced in like manner as other decrees of the orphans' court for the payment of money. The liability for the costs of such proceedings shall be in the discretion of the court.

NOTE.—This is Section 3 of the Act of April 28, 1899, 1 Purd. 743, which was a copy of Section 18 of the Act of 1834, 1 Purd. 742, except for the insertion of the provision for conveyance by the vendor himself, intended to cover the case of a deceased vendee.

The third sentence has now been added to cover the case where the decree of the court is for payment of purchase money by the estate of a deceased vendee. The provision as to costs is also new.

(*e*) Like proceedings may be had in all respects wherever any parol contract shall have been entered into

by any person for the conveyance of real estate within this commonwealth and the purchaser shall have died without fully executing such contract, or wherever any person may have made such parol agreement and died seised or possessed of such real estate and no sufficient provision for the performance of such contract shall have been made by the decedent, in all cases where such parol contract shall have been so far executed that it would be against equity to rescind the same.

NOTE.—This is Section 4 of the Act of April 28, 1899, 1 Purd. 743, except that the latter part, beginning "and no sufficient provision," follows the phraseology of Section 16 of the Act of 1834, 1 Purd. 742, from which Section 4 of the Act of 1899 was derived.

The Act of 1899 reads, "and such parol contract may have been so far executed by possession, by improvement, or by partial payment of purchase money, that it would be against equity to rescind the same."

The Commissioners are of opinion that it is better to use the general language of the Act of 1834 rather than to attempt to define in this act the part performance which is sufficient to take a parol contract for the sale of land out of the Statute of Frauds.

(*f*) In all cases of specific performance of contract which may hereafter be decreed by any orphans' court under the provisions of this section, where the party to whom the deed is to be made is an executor or administrator of the deceased vendor, the deed shall be made, as in other cases, by the co-executor or co-administrator, if there be one; and if there be none, the court may make an order directing its clerk to execute such deed and deliver the same to the grantee therein named, upon such terms as the court shall see fit to require from the grantee, as executor or administrator of the decedent, for securing the faithful appropriation of the unpaid purchase money.

NOTE.—This is Section 2 of the Act of April 9, 1849, P. L. 511, 1 Purd. 742, changed by referring to "the provisions of this section" instead of Sections 15, 16

and 17 of the Act of 1834, and by providing that the deed shall be executed by the clerk of the orphans' court instead of by the sheriff.

SECTION 19. Whenever a devise or bequest shall be made to any corporate body, by any last will and testament, the executors thereof shall, within three months after they undertake the execution of such will, make known, by letter addressed to such corporate body, the nature and amount of such devise and bequest, together with their names and places of residence.

NOTE.—This is Section 66 of the Act of 1834, 1 Purd. 1100, changing "six months" to "three months," and omitting "public" before "corporate body." The main object of the section is notice to charitable corporations, and "public" might seem to restrict it to municipalities.

The section was copied from Section 5 of the Act of April 6, 1791, 3 Sm. L. 20, which, however, imposed the duty of giving notice upon the register of wills. It is to be noted that Section 5 of the Act of 1791 is printed in 4 Purd. 4079 and in 3 P. & L. 6455, 6456, as still in force. It was evidently intended to be repealed by the Act of 1834, and should now be expressly repealed.

SECTION 20. If, after deducting the amount of debts of the testator and the expenses of administration, the residue shall not be sufficient to discharge all the pecuniary legacies bequeathed, an abatement shall be made, in proportion to the legacies so given, unless it shall be otherwise provided by the will.

NOTE.—This is Section 48 of the Act of February 24, 1834, 1 Purd. 1132, which was derived from the last clause of Section 1 of the Act of March 21, 1772, 1 Sm. L. 383.

It is now modified by inserting after "debts" the words "of the testator and the expenses of administration," instead of the words "as aforesaid," which referred to Section 47 of the Act of 1834.

SECTION 21. Legacies, if no time be limited by the will for the payment thereof, shall, in all cases, be

deemed to be due and payable at the expiration of six months from the death of the testator. Interest on all pecuniary legacies, whether bequeathed directly or in trust, shall, unless a contrary intention appear by the will, begin to run from the expiration of one year from the death of the testator, except that if the account of the executor be filed and confirmed and distribution awarded before the end of such year, then interest on such legacies shall run from the date of the award: *Provided*, That where a pecuniary legacy is bequeathed to or for the use of the widow of the testator or any child or descendant of the testator, or any person toward whom the testator in his lifetime stood in loco parentis, or for the maintenance of any person, interest shall, unless a contrary intention appear by the will, begin to run from the date of the death of the testator.

NOTE.—The first four lines of this section, down to the word "testator," are copied from Section 51 of the Act of 1834, 1 Purd. 1134, which was derived from Section 7 of the Act of March 21, 1772, 1 Sm. L. 383. The only change is to substitute "six months" for one year. The remainder of the section is new.

In this section, legacies are made payable at the end of six months, for the reason that in other sections of this act the Commissioners have recommended that executors and administrators should file their accounts at the expiration of this period after the issuance of letters. It is, however, recommended that interest should not begin to run on legacies until after the expiration of one year or an earlier award; as in future most accounts will be filed at the end of six months from the grant of letters, the award of legacies will not be complicated by the calculation of interest.

Interest on legacies to or for the use of a widow or children or those to whom the testator stood in loco parentis, and legacies for maintenance, will, unless it be otherwise provided, run from the death of the testator; but legacies bequeathed in trust for other persons will not carry interest from the date of death, the Commissioners having here adopted the views of Judge Penrose in Twells's Estate, 11 D. R. 713.

SECTION 22. All annuities and all payments of rents, income, interest or dividends of any real or personal property, directed by any will to be made during the lifetime of the beneficiary, or for the life or lives of another person or persons, or for a term of years, shall, like interest on money lent, be considered as accruing from day to day, and shall be apportioned to the date of the death of such beneficiary or of such cestui que vie, or to the end of such term of years.

NOTE.—This is a new section, modeled to some extent on the English Apportionment Act of 33 and 34 Victoria, Chapter 35. Under the existing law, income is apportionable in some instances and not in others. See the cases cited in 11 P. & L. Dig. of Decisions, col. 18690; MacIlwain's Estate, 20 D. R. 1073.

It is to be noted that Sections 7 and 30 of the Act of February 24, 1834 (Sections 11 (*e*) and 35 (*e*) of the present draft), were derived from the statute of 11 George II, Chapter 19, which was the first of a series of statutes in England, culminating in the above cited statute of Victoria, which provides that "all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

The change now recommended by the Commissioners was suggested by Thayer, P. J., in Stewart *vs.* Swaim, 7 W. N. C. 407.

SECTION 23. Whenever any person is or shall be entitled to the income from the proceeds of the sale of a decedent's real estate, and whenever any personal property, or the increase, profits or dividends thereof, has been or shall hereafter be bequeathed to any person, for life, or for a term of years, or for any other limited period, or upon a condition or contingency, the executor or executors, administrator with the will annexed, trustee or trustees under such will, or trustee appointed by the orphans'

court to make such sale of real estate, as the case may be, shall deliver the property so bequeathed to the person entitled thereto, upon such person giving security in the orphans' court having jurisdiction, in such form and amount as, in the judgment of the court, will sufficiently secure the interest of the person or persons entitled in remainder, whenever the same shall accrue or vest in possession. Should such person or legatee refuse or neglect or be unable to enter such security, the court may, upon petition of any person interested, including the owner of any subsequent interest, vested or contingent, in such proceeds of real estate, personal property, or the increase, profits or dividends thereof, and upon due notice to all persons interested, so far as such notice can reasonably be given, appoint a suitable person or corporation as trustee to receive and hold such proceeds of sale or personal property, invest the same in securities authorized by law, pay the income thereof, after deducting all legal charges, to the person entitled thereto, and, upon the termination of the trust, account for and pay to the persons entitled thereto the corpus of the trust fund, or transfer and deliver to them the securities in which it is invested, as the court may direct, after deducting all legal charges thereon. Such trustee shall enter such security as the court may direct. He shall not be an insurer of the trust fund, and shall be liable to the persons interested in the income or corpus of the trust fund only for such care, prudence and diligence in the execution of the trust as other trustees are liable for.

NOTE.—This is Section 1 of the Act of May 17, 1871, P. L. 269, 1 Purd. 1133, amended by reason of the decision in Weir's Estate, 251 Pa. 499, also by inserting the provisions as to proceeds of real estate, and by omitting, at the end of the first sentence, the following: "and any married woman availing herself of the benefits of this act, shall have power, as a feme sole, to bind her separate estate and property by any obligation given by her, as security under this act." This provision seems unnecessary since the Married Women's Acts of 1887 and 1893, as it cannot be taken to mean that a married woman may bind

herself as surety for another, but only that she may be principal in a bond given under the Act of 1871.

That part of Section 46 of the Act of February 24, 1834, 1 Purd. 1123, relating to security by a tenant for life on a sale of real estate for payment of debts, is covered.

Section 49 of the Act of 1834, 1 Purd. 1133, was supplied by the Act of 1871 and is recommended for repeal.

Section 1 of the Act of April 17, 1869, P. L. 70, 1 Purd. 1138, so far as it empowers "the owner of any contingent interest in the personal property of any decedent" to "require the legatee of any previous interest in the same property before receiving the same, to give security," etc., is embodied in the present draft.

The present law seems to require amendment in several particulars. It makes no provision for the case that frequently arises where the life tenant refuses or is unable to enter security; nor does it provide for the case that also frequently arises under existing laws where a widow, for example, is entitled for life to her share of the proceeds of real estate. In such cases it has been the practice for the courts ex necessitate to appoint a trustee without express legislative warrant. The duties of such a trustee were of course not defined by statute; and the supreme court has recently held in Weir's Estate, 251 Pa. 499, that such a trustee practically takes the place of the life tenant, who or whose estate under existing decisions is responsible to the remaindermen at the termination of the life estate for the exact value of the assets received by the life tenant, who thus becomes practically an insurer of the fund. In such circumstances it will be difficult to find any person or corporation who would be willing to assume this responsibility, and this section has been framed to assimilate the duties and responsibilities of such a trustee to those of other trustees.

SECTION 24. The remedy for the collection or enforcement of payment or delivery of all legacies, whether pecuniary, specific or otherwise, and whether charged on land or not, shall hereafter be exclusively in the orphans' court, saving the jurisdiction of other courts in actions which may be pending at the time of the approval of this act.

NOTE.—This is a new section. To all intents and purposes, the remedy for the collection of legacies is now

entirely in the orphans' court, actions at law for the purpose having fallen into disuse. The payment of legacies in general being essentially a part of the distribution of estates in the orphans' court, and that court having, under existing laws, full power to enforce the payment of legacies charged on land, it would seem proper to abolish proceedings in the court of common pleas.

The Commissioners therefore suggest the repeal of Sections 50, 52, 53, 54, 55 and 56 of the Act of 1834, 1 Purd. 1134, 1135. Those sections were derived in part from the Act of March 21, 1772, 1 Sm. L. 383.

The Commissioners of 1830 recited the provision of Section 3 of the Act of 1772, which authorized the court in which an action for a legacy was brought to appoint auditors to ascertain how the accounts of the executor stood and how the assets ought to be apportioned, and remarked upon the great inconvenience of this method, saying: "The best course for all parties, is to refer all questions on the subject of accounts and assets, to the orphans' court, and to suspend proceedings in the other courts, until the result of the settlement in that tribunal is ascertained."

The present Commissioners now recommend that the Legislature take one step more and abolish the remedy by action at law.

Section 25 (*a*) In all cases in which, by the provisions of any last will and testament, or by the provisions of this act, or by proceedings in the orphans' court in any county, any legacy or any money payable at a future period, or any money the interest on which is payable to any person, is or shall be hereafter charged upon, or payable out of real estate, it shall be lawful for the legatee or the person entitled to such money or interest to apply by petition to the orphans' court having jurisdiction of the accounts of the fiduciary. On the presentation of such petition, the court, having caused due notice to be given to such fiduciary, and the devisee or heir, as the case may be, and the present owner, of the real estate charged with such legacy, sum of money or interest, and to such persons interested in the estate or property as justice may require, may proceed according to equity to make a decree directing such devisee, heir or

owner to pay the amount of such legacy, sum of money or interest then due, within a time to be limited by such decree, and providing that in case such devisee, heir or owner shall fail to make payment within such time, the fiduciary, or a trustee to be appointed by said court, in its discretion, shall, after giving public notice of such sale, once a week for a period of three weeks before the day appointed therefor, by advertisement, in at least one newspaper published in the county if there be one, or, if there be none, then in an adjoining county, and by hand bills posted at a conspicuous place on the real estate proposed to be sold and in at least three of the most public places in the vicinity of such estate, make sale of said real estate or so much thereof as may be necessary, for the purpose of payment of such legacy, sum of money or interest. The proceeds of such sale shall be distributed, under the direction of said court, as in other cases of judicial sales, to the persons legally entitled to receive the same. In the case of money charged upon real estate, the interest on which is payable to any person, the court may, instead of directing a sale of such real estate as aforesaid, make such decree or order to enforce payment of said interest as shall be just and proper.

NOTE.—This is a combination of Section 59 of the Act of 1834, 1 Purd. 1135, Section 1 of the Act of May 17, 1866, P. L. 1096, 3 Purd. 3388, as amended by the Act of March 22, 1907, P. L. 29, 6 Purd. 7036, and Section 1 of the Act of April 28, 1899, P. L. 120, 3 Purd. 3389.

Sections 59, 60 and 61 of the Act of 1834 were new in that act, and were intended "to remedy a serious defect in our jurisprudence, arising, like many others, from the attempt to obtain justice with the insufficient machinery of our common law courts," the remedy, before the Act of 1834, having been solely by actions at law.

Section 24 of the present draft makes the remedy in the orphans' court exclusive.

Section 59 of the Act of 1834 ends, "to make such decree or order touching the payment of the legacy, out of such real estate, as may be requisite and just." It has been held that the writ of levari facias is the proper process for enforcing such a decree: Hart *vs.* Homiller's Executor, 23 Pa. 39. The change is made so as to pro-

vide for sale by the executor or a trustee, and the procedure is made to conform with sales for payment of debts. The provisions have also been extended so as to include the terre tenant. In line 6, "person" has been substituted for "widow," and corresponding changes have been made in this and the following clauses. "Once a week for a period of three weeks" has been substituted for "at least twenty days."

The Act of 1866 includes charges on land by proceedings in the orphans' court, and the amendment of 1907 added the words "or otherwise," which are now omitted. The Act of 1899 was intended to facilitate the collection of dower interest in cases of the absence or non-residence of the owners of the land.

(*b*) If the real estate charged with such legacy, sum of money or interest shall be situated in a county or counties other than that the orphans' court of which has jurisdiction of the accounts of the fiduciary, and the devisee, heir or owner, against whom such decree has been made, shall fail to comply therewith according to the terms thereof, such decree may be certified to the orphans' court of any county in which such real estate is situated, or, in case such real estate is divided by a county line, then to the orphans' court of the county where the mansion house may be situated, or, if there be no mansion house, to the county where the principal improvements may be, or, if there be no improvements, to either county. Upon such certification and petition filed by the legatee or the person entitled to such money or to such interest, it shall be the duty of the said orphans' court to make an order for the sale of so much and such parts of such real estate as shall, in their opinion, be necessary to raise the specified sum and to direct the fiduciary, or a trustee to be appointed by said court, to make such sale after public notice as aforesaid given in each of the counties in which the real estate is situated. Such fiduciary or trustee shall in all cases make return of his proceedings, in relation to such sale, to the orphans' court making such order of sale, when, if the same be approved by said court, it shall be confirmed; but the proceeds of such

sale shall be distributed under the direction of the court having jurisdiction of the accounts of the fiduciary or trustee, as provided in clause (*a*) of this section. In the case of money charged upon real estate, the interest on which is payable to any person, the orphans' court to which the decree is certified, as aforesaid, may, instead of directing a sale of such real estate as aforesaid, make such decree or order to enforce payment of said interest as shall be just and proper.

NOTE.—This is Section 60 of the Act of 1834, 1 Purd. 1136, modified so as to correspond to the changes made in the last preceding clause, so as to provide for the filing of a petition by the legatee or other person entitled to payment, so as to include the case where the land is situated in other counties, and so as to make the procedure conform to that prescribed in relation to the sale of real estate for the payment of debts of a decedent.

(*c*) Before such legatee or other person shall be entitled to the benefit of any decree made under the provisions of this section for payment by the devisee, heir or owner of the real estate of the amount of such legacy, sum of money or interest, he or she shall give such security as the court, in which application was originally made, shall direct, for the indemnity of the devisee, heir, owner, or other persons interested, in the event of any debt due by the testator being recovered, for the payment of which such real estate would be liable.

NOTE.—This is Section 61 of the Act of 1834, 1 Purd. 1136, modified so as to apply only to the decree for payment.

SECTION 26 (*a*) Whenever any testator shall have heretofore, by his last will and testament duly proven, given or bequeathed any annuity or annuities to any person or persons, or directed the payment of an annuity or annuities by his executors or by trustees, or bequeathed legacies of principal sums payable at a future period, or upon contingencies or under other circumstances by which the payment or discharge and satisfaction of such

legacies may be postponed, or may not take place until a distant period after the death of such testator, and either by the express words of the will, or by the rules of law in the construction thereof, such annuities or legacies are made or become a charge upon all the residuary real or personal estate of the testator, and whenever any testator shall hereafter make any such bequest and provisions, in any such case, it shall be lawful for the executors of any such will, or for any such annuitant or legatee, or for any person interested in such residuary estate, at any time after the expiration of six months from the granting of letters testamentary, to apply by petition to the orphans' court having jurisdiction of the accounts of such executors, setting forth the facts and praying relief.

NOTE.—This is the first part of Section 1 of the Act of February 23, 1853, P. L. 98, 1 Purd. 1136, the section having been divided on account of its excessive length. The only changes made in this part are to substitute the period of six months for one year, and to add the words "real or personal" before "estate of the testator."

(*b*) Upon the filing of such petition, the court may order a citation to be issued to the parties interested, to appear at a day certain, to show cause why the relief prayed for should not be granted; and upon the return of such citation, if all the annuitants, legatees and other persons interested shall have had due notice of the application, the court may itself inquire into the circumstances, the amount and condition of the estate, and the expediency and propriety of exempting any part or portion of the residuary real or personal estate from the lien and charge of such annuities and legacies, or either of them, having due regard to the absolute and ultimate security of such annuities and legacies; or the court may, at its discretion, refer the case to a master, with directions to inquire into the matters aforesaid and to report thereupon.

NOTE.—This is the second part of Section 1 of the Act of February 23, 1853, P. L. 98, 1 Purd. 1137, altered by

extending its provisions to residuary personal as well as real estate, and by providing that the case may be referred to a master instead of an auditor.

(*c*) After such inquiry by the court or, if the case is referred to a master, after his report has been made and after notice thereof to all persons interested, it shall be lawful for the court to make a decree in the premises, and if it shall appear that all the debts of the testator have been paid or sufficiently secured, the court may enter a decree that such part or parts of the residuary real estate, or such real securities or investments in public stocks or bonds, or such securities as now are or may hereafter be authorized by law as investments by trustees, shall be set apart or appropriated or that such part of the residuary estate shall be so invested as, in the judgment of the court, shall appear to be, and with reasonable probability continue to be, adequate and sufficient, beyond all charges, expenses and deductions, for the payment of such annuities and legacies, providing always a sufficient surplus to meet any contingent diminution or depreciation in the value or income of the estate and securities so set apart.

NOTE.—This is the third part of Section 1 of the Act of February 23, 1853, 1 Purd. 1137.

It has been changed by inserting the provision at the beginning, to cover cases where the court itself hears the evidence; by inserting after "public stocks" the words "or bonds;" by adding the provision as to other legal investments; and by adding the provision for investment, to cover cases where the residuary estate consists of other than legal investments. There are also slight changes in phraseology.

(*d*) When such decree shall have been made, it shall be further lawful for the court to order and decree that all the remaining real or personal estate of the testator, or both, not so specifically set apart, shall be and remain discharged and exonerated from the lien and charge of any and every such annuity and legacy, and such decree shall have the force and effect of discharging and exonera-

ting all such real or personal estate, or both, accordingly: *Provided*, That an appeal from a decree granting or refusing such petition may be taken to the proper appellate court within six months after the entry of the same, as in other cases: *And provided further*, That nothing in this section contained shall be deemed or held to authorize the exoneration of any real estate which may have been or may be specifically charged by a testator with the payment of any annuity or legacy.

NOTE.—This is the last part of Section 1 of the Act of February 23, 1853, 1 Purd. 1137.

The words "or personal" have been inserted in the third line. After "annuity and legacy," in the sixth line, the following has been omitted: "in the hands of any bona fide purchaser of such real estate for a valuable consideration." No reason appears why the exoneration should not operate in favor of devisees and legatees.

The provision as to appeal has been changed so as to meet the decision in McCredy's Appeal, 64 Pa. 428, that an appeal under this section lay only when the decree was in favor of the petitioner. The words "proper appellate" have been substituted for "supreme" in the first proviso, and the period for appeal has been made six months instead of one year.

(*e*) The real estate, securities and investments, set apart and appropriated by order of the court as aforesaid, shall be and continue in the possession, charge and management of the executors, trustees or other persons to whom the same may have been devised or bequeathed by the testator as aforesaid, under and subject to the charge of such annuities and legacies. It shall be the duty of every such executor, trustee and other person, upon request of any person interested, to file with said court, at the expiration of one year after such decree shall have been made, and at the expiration of every year thereafter until the termination of such trust, an account setting forth the situation and circumstances of such estate, securities and investments, and the annual income therefrom, and the payments thereout. If, upon such account, it shall appear to the court that the said income

exceeds, in any considerable degree, the amount of the existing annuities and other charges and expenses payable thereout, it shall be lawful for the court to order and decree that such surplus income may be paid over to such persons as may be entitled to the residuary estate under the provisions of the will, or the court may, in their discretion, order and decree that the same be invested in real securities, public stocks or bonds, or such securities as now are or may hereafter be authorized by law as investments by trustees, for the further or additional security of such annuitants or legatees.

NOTE.—This is Section 2 of the Act of February 23, 1853, P. L. 98, 1 Purd. 1137, changed by inserting "investments" instead of "stocks or bonds" in the first line and in corresponding places; by changing "make report to the court" to "file with said court;" by providing that the accounts shall be filed at the request of any person interested; and by inserting at the end "or such securities as now are or may hereafter be authorized by law as investments by trustees."

(*f*) Upon the application of any person interested in any residuary estate, set apart as aforesaid, setting forth that, by reason of the decease of any such annuitant, or by the happening of any other event, the charge of any annuity or legacy as aforesaid has become extinguished, in fact or law, it shall be lawful for the said court, from time to time, after due notice and inquiry into the facts, to make an order and decree for the exoneration and discharge of such part or portion or so much of the real estate, securities and investments, so set apart and appropriated, as may appear to such court to be beyond the amount requisite or proper for the purpose of providing a sufficient continuing security for the payment of the remaining annuities and legacies. Every such order or decree shall have the same force and effect in respect to the real estate, securities and investments, therein and thereby exonerated and discharged, as is declared in clause (*d*) of this section, in respect to the residuary estate not specifically set apart and appropriated. An appeal from

the entry of or refusal to enter such order or decree may be taken to the proper appellate court within six months, as in other cases.

NOTE.—This is Section 3 of the Act of February 23, 1853, 1 Purd. 1137, the phraseology being altered to conform to clause (*e*), and the last sentence being added to correspond to clause (*d*).

(*g*) Nothing in this section contained, or in any decree or order made by any orphans' court by the authority of this section, shall be deemed or held to affect in any way the legal or equitable rights of any person or persons interested in the residuary estate set apart and appropriated as aforesaid, but all such rights to the ultimate enjoyment of such estate shall remain and continue as before the passage of this act, so far as the provisions of this section are concerned.

NOTE.—This is Section 4 of the Act of February 23, 1853, 1 Purd. 1138. The changes are the substitution of "section" for "act" in the first and third lines, and the addition, at the end, of the words "so far as the provisions of this section are concerned."

SECTION 27 (*a*) 1. In all cases in which, under any proceeding in any orphans' court of this commonwealth, or by any last will and testament, or by the provisions of this act, any dower, legacy, recognizance or other charge shall have been imposed upon land, or any part thereof, and such charge is due and payable, and the person or persons to whom such payment is due cannot be found after diligent and reasonable search, it shall be lawful for the owner of the land charged to apply by petition to the orphans' court of the county where said land is situated, or, in case said land is divided by a county line, to the orphans' court of the county where the mansion house may be situated, or, if there be no mansion house, in the county where the principal improvements may be, or, if there be no improvements, in either county, setting forth the circum-

stances of the case, the name or names of the person or persons to whom such payment is due or the fact that such names are unknown, and the time when such legacy or charge, or any part thereof, became due and payable, and a description of the land subject to the charge. Thereupon said court shall make an order directing such petitioner to give public notice of the facts set forth in such petition, by publication once a week for four successive weeks in one or more newspapers published within or nearest to said county or within or nearest to each of said counties, requiring the person or persons to whom such legacy or charge, or any part thereof, is due and payable, or who wish to lay claim to the moneys as aforesaid, to appear in court on a day designated, not less than twenty days after the last publication of said notice, and show cause why the amount so due and payable, as set forth in said petition, should not be paid into said court.

NOTE.—This is the first part of Section 1 of the Act of July 14, 1897, P. L. 269, 3 Purd. 3388, condensed by omitting unnecessary repetitions. The first part has been changed so as to be uniform with clause (*b*) 1 of this section. Provision has been made for cases where the land is divided by a county line; and the provisions for notice have been modified by requiring publication for four weeks and appearance not less than twenty days after the last publication, instead of publication for three weeks before the first day of the next term of court and appearance at the next term.

2. If no person shall appear to show cause, as aforesaid, or if the person or persons appearing shall fail to show that he or they are entitled to such moneys, the court, being satisfied of the truth of the facts set forth in said petition, shall enter a decree that the amount of such legacy or charge, or part thereof, due and payable to the time of final decree, be paid into court, and that, upon such payment, such real estate shall be discharged from the lien of such legacy or charge, or from so much thereof as shall be so paid into court. When

the amount of such legacy or other charge does not appear as a matter of record, the court may, by appointment of a master or by investigation in open court, ascertain and fix such amount. A certified copy of such decree may be recorded in the deed book in the office for recording deeds in every county where such real estate or any part thereof is situated, in the same manner and with like effect as deeds of conveyance of real estate are recorded, and shall be indexed by the recorder in the grantors' index under the name of the decedent and in the grantees' index under the name of the owner of the land; and the charges for recording shall be the same as are provided by law for similar services.

NOTE.—This is the remainder of Section 1 of the Act of July 14, 1897, 3 Purd. 3388, condensed in the same manner as the first part, and modified as to the decree and recording so as to follow the provisions of the Act of 1861, clause (*c*) of this section.

(*b*) 1. In all cases in which, under any proceeding in any orphans' court of this commonwealth, or by any last will and testament, or by the provisions of this act, any dower, legacy, recognizance, or other charge shall have been imposed upon land, payable presently or at a future time, and such charge shall have been paid, or a period of twenty years shall have elapsed after the principal of such charge has become due and payable and no payment shall have been made within such period on account of such charge by the owner or owners of the land, and no sufficient satisfaction, release, acquittance or acknowledgment of payment thereof shall be of record in the county in which the land is situated, it shall be lawful for the orphans' court of said county, or, in case said land is divided by a county line, then the orphans' court of the county where the mansion house may be situated, or, if there be no mansion house, in the county where the principal improvements may be, or, if there be no improvements, in either county, to entertain a petition for the discharge of said land from the lien of said charge.

NOTE.—This is the first part of Section 1 of the Act of May 8, 1895, P. L. 44, 4 Purd. 4047, altered so as to apply only to charges enforceable in the orphans' court. The section as it now stands includes encumbrances and charges enforceable in the common pleas.

This part of the section has been modified so as to include legacies and other charges, and thus supply Section 1 of the Act of June 8, 1893, P. L. 356, 4 Purd. 4046. The period has been made twenty years, which is the ordinary period for presumption of payment, instead of twenty-one years.

The section in the Act of 1895 is very long and consists of one sentence. It is here subdivided for the sake of clearness.

2. Such petition shall be presented by the owner or owners of said land or any part thereof, shall be duly verified by affidavit, and shall set forth the facts and allege that said charge has been paid or that no payment of principal or interest has been made within said period of twenty years on account of said charge by the present owner or owners, or, so far as can be ascertained, by his or their predecessors in title, and shall state the names of all known parties interested in such charge, their places of residence, if known, and a description of the lands subject to the charge and sought to be released and discharged.

NOTE.—This is the second part of Section 1 of the Act of May 8, 1895, P. L. 44, 4 Purd. 4047.

3. Upon the presentation of such petition, it shall be lawful for said court to issue a citation in the manner authorized by law to all such parties, which citation shall be served as other citations are required to be served, and shall require the parties to appear in court on a day designated, to show cause why said land should not be discharged from the lien of such dower, legacy or other charge.

NOTE.—This is substituted for the provisions of Section 1 of the Act of May 8, 1895, P. L. 44, 4 Purd. 4047, as to service of notice and publication thereof in newspapers.

4. If the court, aided if necessary by the report of a master, shall determine, at a hearing held in pursuance of said citation, that such dower, legacy or other charge has been paid or is otherwise no longer chargeable upon the land by reason of any presumption of payment, or if no person shall appear to answer the citation, or if all parties in interest shall have joined in the petition upon which such citation was issued, the court, being satisfied of the truth of the allegations of the petition, shall decree that the land subject to the charge, or any part thereof, sought to be released or discharged, shall be released and discharged from the same and the payment thereof; and a certified copy of such decree may be recorded in the office for recording deeds in each county where such land or any part thereof is situated, upon the terms and with the effect provided in clause (*a*), paragraph 2 of this section.

NOTE.—This is the last part of Section 1 of the Act of May 8, 1895, 4 Purd. 4047, altered so as to conform to the changes made in the previous parts of the section, and so as to provide for determination of the questions in the same proceeding instead of requiring the persons claiming payment to institute another proceeding to enforce payment.

Section 2 of the Act of 1895, 4 Purd. 4048, provides for the appointment of guardians ad litem, and is omitted as unnecessary in view of the general provisions of Section 59 (*k*) of the present draft.

(*c*) Whenever any dower, legacy, recognizance or other charge has been or shall be charged upon or payable out of real estate, by virtue of any last will and testament, by the provisions of this act, or under any proceeding in any orphans' court of this commonwealth, or whenever it shall be claimed that such charge exists, it shall be lawful for said court, in any case not provided for by the preceding clauses of this section, on petition of the devisee or heir of such real estate, or any owner thereof, claiming under such devisee or heir, to authorize such petitioner to pay into said court the full amount of such legacy or other

charge; whereupon the said court shall make a decree, discharging such real estate from the lien of such legacy or other charge, or from so much thereof as shall be so paid into court; and a certified copy of such decree may be recorded in the office for recording deeds in any county where such land or any part thereof is situated, upon the terms and with the effect provided in clause (*a*), paragraph 2 of this section.

NOTE.—This is Section 1 of the Act of May 1, 1861, P. L. 420, 1 Purd. 1136, modified so as to cover all cases not provided for by the preceding clauses of the present section of the draft, and with some changes in phraseology.

Section 2 of the Act of May 17, 1866, P. L. 1096, 3 Purd. 3388, is covered by the provisions of this and the preceding clauses, and is therefore recommended for repeal.

Sections 22 and 23 of the Act of April 26, 1850, P. L. 581, 3 Purd. 3436, extending to legacies charged on land the provisions of Section 1 of the Act of March 31, 1823, P. L. 216, relating to the satisfaction of mortgages, are recommended for repeal, the matter being sufficiently covered by the present section of this draft.

(*d*) All moneys, when paid into court under the provisions of any of the preceding clauses of this section, shall remain therein until the legatee or other person claiming the same shall present a petition for the distribution thereof, whereupon the court shall, after due notice to all parties interested, make distribution of said moneys to the persons legally entitled to receive the same, or may, in its discretion, appoint an auditor for the purpose of making such distribution.

NOTE.—This is a combination of Section 2 of the Act of May 1, 1861, P. L. 420, 1 Purd. 1136, and Section 2 of the Act of July 14, 1897, 3 Purd. 3389. The provision for appointment of an auditor is derived from Section 2 of the Act of May 17, 1866, P. L. 1096, 3 Purd. 3388, but the appointment is made discretionary.

The Act of 1861 provides that distribution shall be made "in the manner provided for the distribution of the proceeds of sheriff's sales, when paid into court and directed to be paid out."

(*e*) All costs of proceedings under the provisions of any of the clauses of this section shall be paid as may be directed by the court.

NOTE.—This is substituted for Section 3 of the Act of 1895, 4 Purd. 4048, which provides that the costs of proceedings on petitions presented under the act shall be paid by the petitioners, but that the costs of proceedings instituted in response to orders under the provisions of the act shall abide the decision of such proceedings.

Section 4 of the Act of 1895 is a general repealing clause, with a proviso that the act "shall not apply to any proceedings now pending, but the same may be proceeded with under existing laws to final decree."

(*f*) Any party aggrieved by any definitive order or decree entered by the court under any of the provisions of this section may appeal from such order or decree to the proper appellate court as in other cases.

NOTE.—This is a new clause, introduced in order to remove any possible doubt as to the right of appeal. Some of the existing acts, such as Section 1 of the Act of May 8, 1895, 4 Purd. 4048, contain provisions that the decree "shall forever thereafter operate as a release and discharge of the land from the incumbrance of the charge and shall bar all actions brought thereon," without making any provision for an appeal.

SECTION 28 (*a*) The executors of the last will of any decedent, to whom is given thereby a naked authority only to sell any real estate, shall take and hold the same interests therein, and have the same power and authorities over such estate for all purposes of sale and conveyance, and also of remedy by entry, by action or otherwise, as if the same had been thereby devised to them to be sold, saving always, to every testator, the right to direct otherwise.

NOTE.—This is Section 13 of the Act of 1834, 1 Purd. 1099, which corresponded to Section 14 of the Commissioners' Draft. It was derived substantially from Section 4 of the Act of March 31, 1792, 3 Sm. L. 66.

(*b*) All powers to sell or let real estate on groundrent, contained in any will, shall be deemed and taken to authorize sales, conveyances or leases, either public or private, unless expressly restricted by the said instrument to one or the other mode.

NOTE.—This is a part of Section 1 of the Act of March 14, 1849, P. L. 164, 4 Purd. 4924. After "any will," the words "hereafter executed" are omitted. The remainder of the section relates to powers contained in deeds or other instruments and to private sales or leases made before the passage of the act.

Section 2 of the Act of March 14, 1850, P. L. 195, 1 Purd. 376, also validated private sales and leases theretofore made.

(*c*) All powers, authorities and directions, relating to real estate, contained in any last will, and not given to any person by name or by description, shall be deemed to have been given to the executors thereof; but no such power, authority or direction shall be exercised or carried into effect by them, except under the control and direction of the orphans' court having jurisdiction of their accounts, and after the entry of security if the court shall so direct.

NOTE.—This is Section 12 of the Act of February 24, 1834, P. L. 73, 1 Purd. 1098, which corresponded to Section 13 of the Commissioners' Draft. This, and the two following sections of that draft, were digested from the Acts of March 31, 1792, Section 4, 3 Sm. L. 66, and March 12, 1800, 3 Sm. L. 433.

The previous law was stated in Lloyd *vs.* Taylor, 2 Dallas 223, 1 Yeates 422.

The words at the end, beginning with "and after the entry" are new.

(*d*) In all cases wherein testators shall have devised their real estate, or any part thereof, to their executors to be sold, or shall have authorized or directed such executors to sell and convey such real estate, or shall have directed such real estate to be sold without naming or declaring who shall sell the same, if one or more of

such executors shall die, refuse, renounce, or be dismissed or discharged, it shall be lawful for the surviving, acting or remaining executor or executors, or for the administrator or administrators with the will annexed, if such there be, to bring action for the recovery of possession of such real estate, and against trespassers thereon, to sell and convey such real estate, or manage the same for the benefit of the persons interested therein, and otherwise act respecting the same, as fully and completely as he or they, together with such dying, refusing, renouncing, dismissed or discharged co-executor or co-executors, would be empowered to do, if there had been no death, refusal, renunciation, dismissal or discharge, or, in the case of an administrator with the will annexed, as fully and amply as if all the executors named in the will had joined therein: *Provided*, That nothing in this clause shall be deemed or taken to prevent any testator from directing, by his last will and testament, otherwise than is herein declared and enacted.

NOTE.—This is a combination of the provisions of Sections 1 to 5, inclusive, of the Act of March 12, 1800, 3 Sm. L. 433, 1 Purd. 1097–1098.

It is recommended that this be substituted for Section 14 of the Act of 1834, 1 Purd. 1099, which was derived from the Act of 1800, but is not so complete.

It would seem that, in spite of the Act of 1834, the Act of 1800 is now in force. See Section 8 of the Act of April 22, 1856, P. L. 532; Ross *vs.* Barclay, 18 Pa. 179; Bell's Appeal, 66 Pa. 498.

SECTION 29. Any fiduciary with power to convey lands or tenements in this commonwealth, may make conveyance under such power by and through an attorney or attorneys duly constituted, and such conveyances shall be of the same validity as if executed personally by the constituent; and all conveyances so heretofore bona fide made by such fiduciaries are hereby confirmed: *Provided*, That nothing herein contained shall authorize any fiduciary to delegate to others the discretion vested in himself for the general management of his trust.

NOTE.—This is Section 1 of the Act of March 14, 1850, P. L. 195, 1 Purd. 376, except that "fiduciary" has been substituted for "trustee, executor or other persons acting in a fiduciary character."

This section of the Act of 1850 seems to apply to other fiduciaries than those included in the present act, and should not be generally repealed. Section 2 of the Act of 1850, 1 Purd. 376, relates to the authority of agents or attorneys in fact, and does not belong in the present act.

SECTION 30. Whenever any person seised of real estate situated in this commonwealth has died or shall die, having first made and published his last will and testament, wherein said real estate is devised to executors or trustees named therein in trust to make sale thereof, or wherein the sale of real estate is authorized or directed but no person is designated to make such sale, and the executors have complied with the provisions of Section 28, clause (*c*), of this act, or wherein said executors or trustees are authorized to make sale of said real estate, convert the same into money, and distribute the proceeds of such sale or sales, or any part thereof, or hold the same in trust for any particular purpose, or for the use of any particular person or persons named in said last will and testament, the person or persons purchasing the real estate so sold from the executors or trustees named in said last will and testament, under the power of sale or direction to sell contained therein, shall take title thereto free and discharged of any obligation to see to the application of the purchase money.

NOTE.—This is Section 1 of the Act of June 10, 1911, P. L. 874, 7 Purd. 7703. Section 2 of that act is merely a repealer.

The changes are, to make the section include cases where sale is authorized or directed but no one is designated to make the sale, and cases where the sale is merely for the purpose of distribution.

So far as sales under testamentary powers are concerned, Section 19 of the Act of February 24, 1834, 1 Purd. 1122, providing for payment of purchase money into court, is superseded by the Act of 1911, and is now recommended for repeal.

SECTION 31. Unless it be otherwise provided by the will, any testamentary trustee shall have power to make a lease of real estate included in the trust for a term not exceeding five years, and any guardian shall have power to make a lease of real estate belonging to his ward for a term not exceeding five years that shall expire before the minor, if living, would attain his majority. If any testamentary trustee or guardian shall deem it advisable to make such lease for a longer period than aforesaid, the orphans' court of the county wherein such real estate shall be situated, on the application of such trustee or guardian, being aided where necessary by the report of a master, may authorize such trustee or guardian to lease such real estate, on such terms and conditions, at such rental, and for such period, as shall appear just and equitable to said court, with the same force and effect as though said lease were made by the beneficial owner or owners and he or they were sui juris and owned the property in fee. In all cases where such application shall be approved by any orphans' court, the court may direct said trustee or guardian, before making such lease, to file his bond in said court, in such sum as the court shall direct, and with good and sufficient corporate security, or with two good and sufficient individual sureties, approved by said court, conditioned for the faithful application or payment by him of all rents to be received under said lease: *Provided*, That where such trustee or guardian shall be a corporation, duly authorized by law, the court may, in lieu of security as aforesaid, permit such corporation to enter its own bond without surety.

NOTE.—This is a new section. Its form somewhat resembles that of the local Act of March 18, 1869, P. L. 409, 1 Purd. 1088, relating only to leases by guardians of mineral lands in Mercer County.

The existing law leaves the power of a trustee to make leases beyond the lifetime of the beneficiary extremely doubtful: Craig's Estate, 24 D. R. 851. The proposed section gives express power to make leases for five years and provides a method of obtaining authority to make longer leases.

SECTION 32 (*a*) Whenever, by the provisions of any last will and testament admitted to probate in any county of this commonwealth, any of the real estate of the testator is ordered or directed to be sold and the proceeds therefrom are bequeathed, or are payable or distributable, in whole or in part, to any minor or minors, or cestuis que trust, and it is the desire of all the legatees and beneficiaries interested in said proceeds to elect to take said real estate, in lieu of the several bequests or legacies or interests, it shall be lawful for the orphans' court having jurisdiction of the accounts of the executor of said will, upon the petition of any fiduciary interested, to authorize and empower said fiduciary, on behalf of his ward or cestui que trust, to enter into an election in writing, to take said real estate or part thereof in fee, in lieu of the legacy or legacies, interest or interests, bequeathed or payable or distributable as aforesaid, taking and being entitled to an estate in said real estate commensurate with the interest said minor or cestui que trust would have had in the fund derived from the sale of said real estate, if the same had been sold in accordance with the provisions of said will. Such election shall be duly acknowledged and recorded in the deed book in the office of the recorder of deeds for the county in which such real estate is situated, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the name of the ward or cestui que trust, the charges for recording to be the same as are provided by law for similar services, and shall then be filed in the office of the clerk of said orphans' court.

NOTE.—This is Section 1 of the Act of July 22, 1913, P. L. 908, 5 Purd. 5888, extended to cover all cases of cestuis que trust, as well as minors, and altered by transposing the language for the sake of clearness, and by making some verbal changes not affecting the substance.

(*b*) Whenever, by the provisions of any last will and testament admitted to probate in any county of this

commonwealth, money is directed to be laid out or invested in real estate, for the use of any minor or minors, or cestuis que trust, and it is the desire of all the beneficiaries interested to elect to take said money instead of the real estate, it shall be lawful for the orphans' court having jurisdiction of the accounts of the executor of said will, upon petition of any guardian or trustee interested, to authorize and empower said guardian or trustee, on behalf of his ward or cestui que trust, to enter into an election in writing, which shall be filed in the office of the clerk of said court, to take said money in lieu of the real estate, taking and being entitled to an interest in said money commensurate with the estate said minor or cestui que trust would have had in the real estate if the same had been purchased in accordance with the provisions of said will.

NOTE.—This is a new clause, introduced to cover the converse of the case provided for in clause (*a*).

(*c*) All elections to take real estate in lieu of legacies or interests, or money instead of real estate, heretofore made by any guardian or trustee pursuant to an order of any orphans' court in this commonwealth, are hereby ratified, confirmed and validated.

NOTE.—This is Section 2 of the Act of July 22, 1913, P. L. 908, 5 Purd. 5888, with some verbal changes and the addition of words to cover clause (*b*).

SECTION 33 (*a*) Whenever, in any last will and testament, the testator has directed or shall direct all or any part of his real estate to be appraised and sold, or has devised or shall devise such real estate to any person or persons at an appraisement to be made, or has given or shall give to any person or persons the right to take such real estate at an appraisement directed by the testator to be made but has not indicated or shall not indicate by whom such appraisement shall be made, it shall be lawful for any of the parties interested in such real estate or in

the sum to be paid therefor to apply, by petition, to the orphans' court of the county in which said real estate is situated, or, in case the real estate is divided by a county line, in the county where the mansion house may be situated, or, if there be no mansion house, in the county where the principal improvements may be, or, if there be no improvements, in either county, setting forth the terms and character of such devise or direction of the testator, and also the names and residences, when known, of all parties interested.

NOTE.—This is Section 1 of the Act of April 17, 1869, P. L. 72, 1 Purd. 1124, altered in phraseology and by providing that the petition may be by persons interested in the sum to be paid for the real estate.

(*b*) Upon the presentation of such petition, said court shall appoint two or more disinterested and competent persons, citizens of the county, to make such appraisement, unless the testator has designated the number of persons to make such appraisement, in which case, the court shall appoint the number of persons so designated; and the court shall, by general rule or by special order in the particular case, provide for notice to be given to all parties interested of the time and place of making such appraisement.

NOTE.—This is Section 2 of the Act of April 17, 1869, P. L. 72, 1 Purd. 1124, omitting the provision for the award of an inquest directed to the sheriff, and the provision at the end that the notice shall be given in the same manner as notice is required to be given in partition proceedings, and substituting "competent" for "judicious" in line 2.

(*c*) The appraisers so appointed shall be sworn or affirmed, well and truly and without prejudice or partiality, to value and appraise such real estate; and each of such appraisers shall receive, as compensation for his services, such amount as may be allowed by said court, such compensation to be paid out of the estate of the decedent, as part of the costs of administration.

NOTE.—This takes the place of Section 5 of the Act of 1869, 1 Purd. 1124, which provides that the appraisers "shall be duly qualified by the sheriff well and truly," etc., and of Section 6 which provides that the sheriff and appraisers shall receive the same fees as are allowed in cases of partition in the orphans' court.

(*d*) The appraisement so made shall be returned to the said orphans' court and, if confirmed by said court, shall be conclusive on all the parties interested in said real estate, unless an appeal be taken from such decree of confirmation to the proper appellate court within six months after the date thereof.

NOTE.—This is Section 3 of the Act of April 17, 1869, P. L. 72, 1 Purd. 1124, the period for appeal having been changed from three months to six, the usual period. The phraseology has also been modified so as to make it clear that a decree of confirmation is to be entered.

(*e*) Upon the return and confirmation of such appraisement, the court shall issue its citation to the person or persons entitled to take such real estate on compliance with the terms of the will, to appear at a time fixed by said court to accept or refuse the same. If, upon the return of such citation, duly served, such person or persons shall appear and accept such real estate at the appraisement, and shall pay or secure the payment of the amount thereof at such time and upon such terms as shall be fixed by said court, then the court shall adjudge such real estate to such person or persons. If such person or persons shall fail or neglect to appear and accept such real estate at the appraisement or shall refuse to accept it, or, having accepted, shall fail to pay or secure the amount of such appraisement as aforesaid, then the court shall adjudge such real estate to the person or persons entitled thereto under the provisions of the will in the event of such real estate not being taken at the appraisement directed by the testator, or, if the will contains no provision for such event, then the court shall adjudge such real estate to the persons legally entitled thereto. Any

such decree may be recorded in the deed book in the office for recording deeds of any county in which such real estate is situated, with the same effect as deeds are recorded, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the name or names of the person or persons accepting such real estate at the appraisement, or of the person or persons entitled thereto in the event of such real estate not being taken at the appraisement, or of the person or persons legally entitled thereto where the will contains no provision for a failure to take at the appraisement, as the case may be, and shall be registered in the survey bureau, or with the proper authorities empowered by law to keep a register of real estate, if any there be, in said county, and the charges for recording and registering shall be the same as are provided by law for similar services.

NOTE.—This is Section 4 of the Act of April 17, 1869, P. L. 72, 1 Purd. 1124, modified so as to provide for a citation and to cover the cases of refusal to accept, of failure to pay after accepting, and of failure of the will to provide for a case of failure to take at the appraisement. The provision for recording and registering is new.

(*f*) In all cases of wills, heretofore or hereafter made and duly proved and recorded, wherein the testator has given or shall give the right to one or more persons to take any or all of his real estate at a certain valuation therein named, and has appointed or shall appoint such person or persons as executor or executors, to whom letters testamentary are issued, such person or persons may present his or their petition to the orphans' court of the county in which such real estate is situated, or, in a case where the real estate is divided by a county line, in the county where the mansion house may be situated, or, if there be no mansion house, in the county where the principal improvements may be, or, if there be no improvements, in either county, setting forth the terms and character of such devise or direction, that he

or they have been appointed executor or executors of the will, that letters testamentary have been issued to him or them, and formally accepting such real estate at such valuation. Upon the presentation of such petition, the court shall have power to adjudge the real estate to such person or persons, and to decree that he or they shall account for the valuation thereof in the settlement of his or their accounts in the orphans' court having jurisdiction of such accounts.

NOTE.—This is Section 1 of the Act of March 5, 1903, P. L. 10, 1 Purd. 1124, with some changes in phraseology for the purpose of condensation. In the next to the last line, "in the orphans' court" has been substituted for "with the register of wills."

(*g*) Whenever any orphans' court shall have heretofore made a decree adjudging real estate to certain persons, in any case mentioned and provided for in clauses (*e*) and (*f*) of this section, such decree shall be valid and available to vest in the person or persons to whom such real estate was adjudged, all the right, title and interest of the testator who had died, leaving a will wherein the right to accept such real estate was given.

NOTE.—This is Section 2 of the Act of March 5, 1903, P. L. 10, 1 Purd. 1125.

SECTION 34 (*a*) Whenever, by any last will and testament, any dwelling-house or other building is devised to any person or persons, without defining the boundaries of the curtilage or lot appurtenant to such building and necessary for the use and enjoyment of the same, it shall be lawful for any of the parties interested to apply by petition to the orphans' court of the county in which such building is situate, for the appointment of commissioners to designate the boundaries of the curtilage or lot appurtenant to such building, and necessary for the convenient use of the same, for the purposes for which it was intended.

NOTE.—This is Section 1 of the Act of April 14, 1868, P. L. 97, 3 Purd. 3389, revised by omitting unnecessary

verbiage, and by omitting after "last will and testament" the following words: "or by reservation or limitation in any deed or deeds of conveyance, or by reservation in any partition between tenants in common or coparceners," and after "devised," the words "bequeathed, reserved or limited." The word "bequeathed" is inappropriate; and it is difficult to see why the orphans' court should have jurisdiction in cases arising under deeds or amicable partitions, which have nothing to do with decedents' estates.

In the seventh line, the words "by petition" have been substituted for "in writing."

(*b*) It shall be the duty of the said court, on presentation of such petition, to appoint two or more disinterested and competent persons, as they shall think proper, for the purposes aforesaid, which persons shall be sworn or affirmed faithfully to perform their duties as commissioners, and shall be respectively entitled to receive from the estate of the testator, for their services as commissioners, such sum as the said court shall deem proper.

NOTE.—This is Section 2 of the Act of April 14, 1868, P. L. 97, 3 Purd. 3390, changed so as to provide for two or more commissioners instead of three, to require that they be "disinterested and competent" instead of "competent and skilful," to require them to be sworn or affirmed, and to leave the amount of their compensation to the judgment of the court, instead of fixing it at one dollar per day.

(*c*) It shall be the duty of the commissioners so appointed to give reasonable notice to all parties interested of the time at which they will examine said dwelling-house or other building for the purposes aforesaid, and to make report to the court in pursuance of the order to them directed. In such report, they shall sufficiently designate and describe, by metes and bounds, with their courses and distances, and by draft, if necessary, the limits and extent of ground necessary for the convenient use of such building, for the purposes for which it was intended. If such report shall be approved by the court, a decree of confirmation shall be entered, a certified copy whereof

shall be recorded in the deed book in the office for recording deeds of the county in which said building is situate, in like manner as deeds are recorded, and with the same effect, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the name of the devisee of such dwelling-house or other building, and shall be registered in the survey bureau, or with the proper authorities empowered by law to keep a register of real estate, if any there be, in such county, upon payment of fees for such recording and registration at the rates fixed by law for similar services; and the devisee of such building shall take the same estate in the ground thus set apart as is devised to him in the building.

NOTE.—This is Section 3 of the Act of April 14, 1868, P. L. 97, 3 Purd. 3390, with some changes in phraseology, the omission, at the end, of the words "reserved or limited," the insertion of the provisions for entry of a decree of confirmation and for recording and registry, and a change in the last clause, which in the Act of 1868, reads that the ground "shall be the exclusive property of the devisee, during the full term for which it was devised."

(*d*) All costs of proceedings under this section, including the fees for recording and registration, shall be paid out of the estate of the testator and shall be considered as part of the costs of administration of the estate.

NOTE.—This is substituted for Section 4 of the Act of April 14, 1868, P. L. 97, 3 Purd. 3390, which reads: "The costs of these proceedings shall be equally divided between all parties interested." That section is unsatisfactory since "all parties interested" is indefinite and "equally" is ambiguous.

SECTION 35 (*a*) No personal action hereafter brought, except actions for slander and for libels, and no action for mesne profits or for trespass to real property, shall abate by reason of the death of the plaintiff or the defendant, but the executor or administrator of the deceased party may be substituted as plaintiff or as defendant, as the case may be, and the suit prosecuted to final judgment and satisfaction.

NOTE.—This and the following clause are intended to cover the whole subject of abatement and survival of personal actions, and to include the subject matter of Section 28 of the Act of 1834, 1 Purd. 1111; Section 18 of the Act of April 15, 1851, P. L. 674, 1 Purd. 1115; the Act of April 12, 1869, P. L. 27, 1 Purd. 228, relating to actions for mesne profits and for trespass to real or personal property; and Section 1 of the Act of June 24, 1895, P. L. 236, 4 Purd. 4824.

Section 28 of the Act of 1834 provides that executors or administrators may "commence and prosecute all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels, and for wrongs done to the person; and they shall be liable to be sued in any action, except as aforesaid, which might have been maintained against such decedent if he had lived."

Section 18 of the Act of 1851 provides that no action "to recover damages to the person by negligence or default shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction."

Section 1 of the Act of 1895 provides that any right of action "by reason of injury wrongfully done to the person of another shall survive the death of the wrongdoer, and may be enforced against his executor or administrator either by continuing against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his representative after his death."

The Acts of 1851 and 1895 were intended to amend the Act of 1834 so as to eliminate the words "for wrongs done to the person." There has been some doubt as to whether the Act of 1895 refers only to cases of physical injury or includes such wrongs as malicious prosecution. It seems better to restate the provisions of the law so as to make them entirely clear.

(*b*) Executors or administrators shall have power to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels; and they shall be liable to be sued in any such

action, except as aforesaid, which might have been maintained against such decedent if he had lived.

NOTE.—This is Section 28 of the Act of 1834, 1 Purd. 1111 (Section 29 of the Commissioners' Draft), inserting the provision as to actions for mesne profits and for trespass to real property, and omitting, after "libels," the words "and for wrongs done to the person." These words were eliminated by the Acts of 1851 and 1895, set forth in the last preceding note.

Section 28 of the Act of 1834 was new, and was intended to "place the law respecting the right of executors and administrators to commence and prosecute personal actions upon a certain and equitable basis." The Commissioners of 1830 further remarked that the cases of slander, libel and wrongs done to the person had "always been excepted here and in England, because being derived mainly from personal considerations, it has been supposed to be against the policy of the law to encourage their transmission to or against the representatives of the deceased party. We are disposed to stop with these exceptions, however, and to place all other actions upon the same footing with respect to the right and also form of action, after the death of the party as before."

(*c*) In all actions of ejectment which may be pending at the time of the death of any vendor of real estate, when the object is to enforce the payment of purchase money due and owing upon an agreement of sale of such real estate, it shall and may be lawful for the executors and administrators of the deceased vendor to sustain the same in their own names, to the same extent and in like manner as their testator or intestate, if living, could do.

NOTE.—This is Section 5 of the Act of April 9, 1849, P. L. 526, 1 Purd. 1115, modified so as to relate only to actions of ejectment pending at the death of the vendor. If no action has been brought in his lifetime, the remedy in the orphans' court is made exclusive by Section 18 (*b*) of the present draft.

(*d*) The executors or administrators of every person who was the proprietor of any rent-charge or other rent or reservation in nature of a rent, in fee or otherwise, as mentioned in Section 11, clause (*f*), of this act,

shall and may have an action for the arrearages of such rent due to the decedent, at the time of his decease, against the person who ought to have paid such rent, or his executors or administrators; or they may distrain therefor upon the lands or tenements which were charged with the payment thereof, and liable to the distress of such decedent, so long as such lands or tenements remain and are in the seisin or possession of the tenant who ought to have paid such rent, or in the possession of any other person claiming the same, from or under the same tenant, by purchase, gift or descent, in like manner as such decedent might have done if he had lived.

NOTE.—This is Section 29 of the Act of 1834, 1 Purd. 1111 (Section 30 of the Commissioners' Draft), which was founded on Section 1, Chapter 37 of the statute 32 Henry VIII.

The words "of debt" have been omitted after "action" in the fifth line.

(*e*) The executors or administrators of any tenant for life, who shall die before or on a day on which any rent was reserved or made payable upon any demise or lease of any real estate, which determined on the death of such tenant for life, may have an action to recover from the lessee or under-tenant of such real estate, if such tenant for life die on the day on which the same was made payable, the whole, or, if before the day, a proportion of such rent for the last year, or quarter of a year, or other current period of payment, according to the time elapsed at the decease of such tenant for life as aforesaid.

NOTE.—This is Section 30 of the Act of 1834, 1 Purd. 1111 (Section 31 of the Commissioners' Draft), which was derived from the statute 11 George II, Chapter 19, Section 15.

The words "on the case" have been omitted after "action" in the fifth line.

(*f*) The executors or administrators of any person who, at the time of his decease, was a party, plaintiff, peti-

tioner, defendant or respondent, in any action or legal or equitable proceeding pending in any court of this commonwealth, shall have full power, if the cause of action shall by law survive to or against them, to become party thereto and prosecute or defend such suit or proceeding to final judgment or decree, as fully as such decedent might have done if he had lived; and if such party die after judgment, certificate, or decree in his favor, his executors or administrators may proceed to execution thereupon, as such party might have done if he had lived.

NOTE.—This is Section 26 of the Act of February 24, 1834, 1 Purd. 1110 (Section 27 of the Commissioners' Draft), derived, as to the first part, from the Act of April 13, 1791, 3 Sm. L. 28, and, as to the last clause, intended to sanction expressly the existing practice of substituting the executor or administrator of the plaintiff in a judgment without sci. fa. See Romer's Admr. *vs.* Sterling, 10 S. & R. 119.

The Commissioners remarked that they had placed decrees of the orphans' court on the same footing with judgments. It has been held that the section applies to proceedings in equity as well as at law: Carroll *vs.* Tufts, 9 D. R. 144. The words "or equitable" have now been inserted.

Under this section, it was held that all personal actions survived, except actions for slander, libel or wrongs done to the person: Miller *vs.* Wilson, 24 Pa. 114. Actions for wrongs to the person are covered by clause (*b*) of this section of the draft.

The last clause is now changed so as to include cases of judgments for costs, and certificates, in favor of a defendant.

(*g*) The court in which any action or legal or equitable proceeding may be pending at the time of the decease of a party, plaintiff, petitioner, defendant or respondent, shall have power to require, by writ of scire facias, the executors or administrators of such party, within twenty days after the service thereof, to become party to such action or proceeding, or to show cause why they should not be made party thereto, by judgment of the court, and further proceedings be had in such action or proceed-

ing; but in every such case, the executors or administrators, who shall become party as aforesaid, shall be entitled to a reasonable continuance of such action or proceeding, according to the circumstances of the case.

NOTE.—This is Section 27 of the Act of 1834, 1 Purd. 1111 (Section 28 of the Commissioners' Draft), which was derived from the Act of April 13, 1791, 3 Sm. L. 28, Section 8, now altered by inserting the words "or equitable" in the first line, substituting after the word "pending" in the second line, instead of the words "as aforesaid" the words "at the time of the decease of a party, plaintiff, petitioner, defendant or respondent;" and by providing for "a reasonable continuance" instead of a continuance "during one term." The words "at the next succeeding term" have been omitted after "to show cause."

(*h*) Whenever the executor or administrator of a deceased plaintiff, petitioner, defendant, or respondent, in any action or legal or equitable proceeding pending in any court of this commonwealth, resides without the jurisdiction of the said court, the writ of scire facias provided by the preceding clauses of this section may be served on such executor or administrator by the sheriff of the county where he is resident, if in the opinion of the proper court such service may be reasonably practicable; but if otherwise, and also where the said executor or administrator resides in some other state of the United States, such service may be made by publication, in one or more public newspapers, as, in the opinion of the court, will be most likely to give notice to the said executors or administrators; the said manner of service herein provided to have the same force and effect as the manner of service provided by the said clauses.

NOTE.—This is Section 1 of the Act of April 6, 1859, P. L. 384, 1 Purd. 1115. The words "petitioner," "respondent," and "legal or equitable" have been inserted in the second and third lines.

(*i*) No action or other legal or equitable proceeding, commenced by or against fiduciaries, or in which fiduci-

aries are parties, shall abate or be otherwise defeated, by reason of the death, dismissal, removal, resignation or renunciation of any one or more of them, nor by reason of the annulling or revoking of the letters or powers granted to them, or any of them; but such suit or proceeding may be prosecuted to final judgment or decree, by or against such other person or persons as may have been joined with them in the administration or trust, or by or against such person or persons as may be their successors therein, in all cases, in like manner as if no such change had occurred or act been done; and in all cases of vacancy in the administration or trust as aforesaid, the successors therein shall be made party to such action or proceeding, in the manner provided by clauses (*f*), (*g*) and (*h*) of this section.

NOTE.—This is derived from Section 32 of the Act of 1834, 1 Purd. 1113 (Section 33 of the Commissioners' Draft), which was founded on Section 7 of the Act of March 24, 1818, P. L. 285, 4 Purd. 4929. The latter section includes "executors or administrators, trustees or assignees," and is not to be repealed so far as it relates to trustees not within the jurisdiction of the orphans' court, and to assignees.

The Act of 1818 related only to cases in which suit was brought by fiduciaries. The Act of 1834 extended this to suits against executors or administrators.

Section 13 of the Act of April 9, 1849, P. L. 526, 1 Purd. 1115, includes cases in which executors or testamentary trustees are plaintiffs.

Section 32 of the Act of 1834 is altered, in the present draft, by substituting "fiduciaries" for "executors or administrators," by extending it to cases where fiduciaries are parties although the action was not brought by or against them, by adding "removal" in the fourth line, by adding the words "or trust" in the tenth and fourteenth lines, and by substituting a reference to other clauses of the new act for the reference to Sections 26 and 27 of the Act of 1834. The words "or equitable" have been inserted in the first line.

It seems that Section 13 of the Act of 1849, above referred to, may be repealed, as well as Section 7 of the Act of 1818, so far as it relates to fiduciaries within the scope of the present act.

(*j*) The omission of an executor or administrator to plead to any action brought against him in his representative character, that he has fully administered the estate of the decedent, or any other matter relative to the assets, shall not be deemed an admission of assets to satisfy the demand made in such action; also the omission of the plaintiff to reply to any such matter when pleaded, shall not be deemed an admission of the want of assets as aforesaid, nor shall such omission otherwise prejudice either party; and no mispleading, or lack of pleading, by executors or administrators, shall make them liable to pay any debt or damages recovered against them in their representative character, beyond the amount of the assets, which, in fact, have come or may come or should have come into their hands.

NOTE.—This is Section 37 of the Act of 1834, 1 Purd. 1114 (Section 38 of the Commissioners' Draft), which was new in the Act of 1834. In the last line the words "or should have come" have been added. It might be considered that this section has been rendered obsolete by the statutory changes in the system of pleading. But the Commissioners have concluded to recommend its retention lest its omission might give rise to some erroneous inference.

(*k*) In any suit now pending or hereafter to be brought in any court of this state, if the plaintiff be dead or shall die during the pendency thereof, and no letters testamentary or of administration have been or shall be taken out in this state within one year after the suggestion of the death of such plaintiff upon the record, it shall not be the duty of the defendant to raise an administrator for the purpose of prosecuting the same, but the court in which such suit is or shall be pending may, after due service upon the executors named in the will of such plaintiff, if known to defendant, or upon the next of kin of the decedent entitled to administration, of a rule to show cause, enter an order that said suit shall abate, unless, before the return day of such rule, letters testamentary or of administration shall be duly issued.

NOTE.—This is Section 1 of the Act of May 5, 1854, P. L. 570, 2 P. & L. 2665, changed so as to provide for a rule to show cause. The section now provides that at the end of the year the suit shall abate and the prothonotary shall make an entry accordingly, provided that the court shall direct a notice to be served one month before such entry shall be made.

SECTION 36. The statute of limitations shall begin to run against a debt or demand arising or falling due to the estate of a decedent, after his or her death, from the time such debt or demand shall arise or fall due, as aforesaid, notwithstanding that letters testamentary or letters of administration have not been granted on such estate.

NOTE.—This is Section 1 of the Act of April 6, 1905, P. L. 114, 6 Purd. 6527. Section 2 is a general repealer.

In the next to the last line, "granted" has been substituted for "taken out."

SECTION 37. In all cases where executors, administrators, guardians or trustees shall not reside within the county the orphans' court of which has jurisdiction of their accounts, proceedings may be had and suits may be brought against them by creditors and others interested in the estates, in the counties where such accounts are to be settled, and process may be served on said fiduciaries, in any other county by the sheriff of such other county, who shall be deputized for that purpose by the sheriff of the county in which the process issues, or process may be served upon any surety on the official bonds of such fiduciaries.

NOTE.—This is Section 1 of the Act of March 27, 1854, P. L. 214, 4 Purd. 4929, with the insertion of the words "guardians or" instead of "assignees or other," thus limiting the section to fiduciaries within the scope of the present act. The Act of 1854 is not recommended for repeal so far as it relates to other fiduciaries.

The words "the county the orphans' court of which has jurisdiction" have been substituted for "the jurisdiction of the court having control." The provision as to depu-

tizing the sheriff of another county has been substituted for the following: "and process may be served by proper officers of said counties, or their deputies, on said executors, administrators, assignees or other trustees beyond the bounds of said counties, as if they resided therein, or upon any surety on their official bonds, with like effect as if they had resided within the jurisdiction of the courts having control of their accounts."

SECTION 38. Where one of two or more fiduciaries shall be personally or individually indebted, obligated or liable to the estate which he represents, it shall be lawful for the other fiduciaries, or either of them, to institute an action at law, bill in equity, or other appropriate legal or equitable proceeding, on behalf of the said estate, against such fiduciary, individually, to recover or enforce the said indebtedness, obligation or liability, in the same manner as though such fiduciary were not connected with the said estate: *Provided*, That this shall not in anywise affect the duty or liability of such fiduciary to account therefor in the office of the register of wills or in the orphans' court in the manner now provided by law, the remedy herein provided being in addition to other remedies, legal or equitable, already existing.

NOTE.—This covers Sections 1 and 2 of the Act of May 11, 1901, P. L. 174, 1 Purd. 1115, substituting "fiduciaries" for "executors, administrators, guardians, assignees, or trustees," inserting "or liable," and "or liability," substituting "other" for "remaining" in line 4, and inserting in the proviso the words from "office" to "in the."

Since the Act of 1901 includes assignees and trustees other than those over whom the orphans' court has jurisdiction, it should not be repealed generally.

SECTION 39. In all cases where a creditor has appointed or shall appoint his judgment debtor his executor, or where such judgment debtor has been or shall be appointed administrator of the creditor, and the said judgment is a lien on the real estate of such executor or administrator, and the same is bequeathed specifically to a legatee, or generally in the residuary clause of such testator's will, or where any testator or intestate, having

a judgment situated as aforesaid, shall have creditors interested in preserving the lien of such judgment, such legatee or creditor or the next of kin of an intestate, interested in such judgment, may suggest his or their interest in the same upon the record thereof, and issue a writ of scire facias against the defendant, to revive the same, and continue the lien thereof, at any time when such proceedings shall be necessary under the laws of this commonwealth; which judgment, so revived, shall remain for the use of all persons interested therein.

NOTE.—This is Section 2 of the Act of April 3, 1829, P. L. 122, 1 Purd. 1109, changed so as to cover the case of an administrator as well as an executor.

SECTION 40. Whenever it shall be proposed to compromise or settle any claim, whether in suit or not, by or against a minor or the estate of a decedent, or to compromise or settle any question or dispute concerning the validity or construction of any last will and testament or the distribution of any decedent's estate, the orphans' court having jurisdiction of the accounts of the fiduciary shall be authorized and empowered, on petition by such fiduciary, setting forth all the facts and circumstances of such claim or question and proposed compromise or settlement and duly verified by oath or affirmation, and after due notice to all parties interested, and after due consideration, aided, if necessary, by the report of a master, if satisfied that such compromise or settlement will be for the best interests of such minor or of the estate of such decedent, to enter a decree authorizing the same to be made, which decree shall operate to relieve the fiduciary of responsibility in the premises.

NOTE.—This is a new section.

It would seem that, at present, it is doubtful whether the orphans' court has power to authorize compromises, which must be made by fiduciaries on their own responsibility: Lowery's Estate, 9 Pa. C. C. 88; Morton's Estate, 201 Pa. 269.

Such jurisdiction however has been frequently exercised to the very great advantage of the parties litigant or con-

cerned in the dispute; and it is proposed in this section to place the jurisdiction of the court beyond question. Otherwise, a fiduciary may feel bound to litigate and thus throw the chances of the litigation on his cestui que trust or ward, or assume the responsibility of the settlement and take the chance of having his conduct questioned in the future.

SECTION 41 (*a*) 1. When a fiduciary shall have in his hands any moneys, the principal or capital whereof is to remain for a time in his possession or under his control, and the interest, profits or income whereof are to be paid away, or to accumulate, or when the income of real estate shall be more than sufficient for the purpose of the trust, such fiduciary may invest such moneys in the stock or public debt of the United States, or in the public debt of this commonwealth, or in bonds or certificates of debt now created or hereafter to be created and issued according to law by any of the counties, cities, boroughs, townships, or school districts of this commonwealth, or in mortgages or ground rents in this commonwealth: *Provided*, That nothing herein contained shall authorize any fiduciary to make any investment contrary to the directions contained in the will of the decedent in regard to the investment of such moneys.

NOTE.—This and the next two paragraphs are a combination of Section 14 of the Act of March 29, 1832, 1 Purd. 1109, Section 2 of the Act of April 13, 1854, P. L. 369, 1 Purd. 1110, and Section 1 of the Act of May 8, 1876, P. L. 133, 1 Purd. 1110.

The Commissioners believe that the powers of investment granted to fiduciaries under the present law are too greatly restricted and that their enlargement would be welcomed throughout the State. At present trustees are limited to loans of the United States, the State of Pennsylvania, municipal corporations of the State, mortgages and ground rents; and according to the literal wording of the statutes the decree of the orphans' court should be first obtained, although in practice the statutes have been considered as authorizing the investments specified, and the necessity of a preliminary application has been disregarded.

The Commissioners would be willing to recommend a more extensive act were it not for the Constitution, which in Art. III, Section 22, would seem to prohibit the legislature from authorizing an investment in the bonds or stocks of a private corporation. They have, however, drafted this section so as to include investments in bonds of municipal corporations in other states, requiring, in such instances, a preliminary application to the court for authority to make such investments.

The division into three paragraphs has been made for the purpose of clearness. The investments enumerated in paragraph 1 are made legal investments without application to the court. The requirement of the existing laws that the approval of the court shall be obtained in every case is disregarded in practice; and it seems better to omit this requirement except in cases of investments in real estate in Pennsylvania or in bonds of other states or of municipalities outside of the commonwealth, as enumerated in paragraph 2.

Section 14 of the Act of 1832 was copied from the Act of February 18, 1824, P. L. 25, except that it authorizes the investment of surplus income of real estate as well as principal and interest of personal estate.

The above-mentioned sections of the Acts of 1854 and 1876 apply to all trustees, and should be repealed only so far as they relate to fiduciaries who are within the scope of the present draft.

2. When a fiduciary shall have in his hands any moneys, as aforesaid, he may present a petition to the orphans' court having jurisdiction of his accounts, stating the circumstances of the case and the amount or sum of money which he is desirous of investing; whereupon it shall be lawful for the court, upon due proof, aided, if necessary, by the report of a master, to make an order directing the investment of such moneys in real estate in this commonwealth other than ground-rents, or in the bonds or certificates of debt now created or hereafter to be created and issued according to law by any other state of the United States or by any of the counties or cities of such other state, at such prices, or on such rates of interest and terms of payment respectively, as the court shall think fit: *Provided*, That no such investment

shall be directed unless it shall be the opinion of the court that it will be for the advantage of the estate and no change be made in the course of succession by such investment as regards the heirs or next of kin of the cestui que trust: *And provided further,* That nothing herein contained shall authorize the court to make an order contrary to the directions contained in any will in regard to the investment of such moneys.

3. In case the said moneys shall be invested as set forth in paragraph 1 of this clause, or conformably to the directions of the court under paragraph 2 of this clause, the said fiduciary shall be exempted from all liability for loss on the same, in like manner as if such investments had been made in pursuance of directions in the will creating the trust, it being hereby declared that the investments mentioned in this section are legal investments of moneys by fiduciaries.

(*b*) Any fiduciary required by law, by the order of any orphans' court, or by the provisions of any last will and testament, under or by authority of which such fiduciary is acting, to invest funds within his control in mortgages or other securities, may include, as a part of the lawful expense of executing his trust, a reasonable sum paid to a company, authorized under the laws of this state so to do, for guaranteeing the payment of the principal and interest of such mortgage or other securities, not exceeding one-half of one per centum upon the principal of such mortgage or other securities.

NOTE.—This is Section 1 of the Act of May 28, 1907, P. L. 271, 5 Purd. 5893, changed by substituting the word "fiduciary" for "receiver, assignee, guardian, committee, trustee, executor, or administrator," and omitting the reference to "any assignment, deed * * * or other document."

The Act of 1907 should be repealed only so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

Section 2 of the Act of 1907 is a general repealer.

SECTION 42 (*a*) Fiduciaries may themselves, or jointly with others, organize a corporation to carry on the business of the decedent, whether he die testate or intestate, whether the business was owned solely by him or in partnership with others, if such business be one for which a charter could have been obtained in the lifetime of the decedent, and may contribute all or part of the property of the estate which was invested in the business at the time of the death of the decedent, as capital to such corporation and accept stock in the corporation in lieu thereof.

NOTE.—This and the two following clauses are based upon Section 1 of the Act of April 22, 1889, P. L. 42, 4 Purd. 4928, extended to cases of guardians and administrators and to cases where the will does not authorize or direct the continuance of the business. Cases where the testator was a partner with others are also included, and the phraseology has been modified.

The Commissioners have considered that the provisions of the Act of 1889 might well be extended in this way. Very often the testator is engaged in a profitable business and its incorporation will obviously be of great benefit to the cestuis que trust interested in the estate, or when the decedent dies intestate the interests of his minor children can best be conserved by an incorporation of the business. In the present state of the law this cannot be done by trustees or guardians without possible risk to them personally; and in cases of a partnership dissolved by death, where the partnership articles do not sufficiently protect the estate of the deceased partner, a forced liquidation may be disastrous.

As the incorporation must be effected under the supervision of the court, it is conceived that the interests of all parties concerned will be properly safeguarded.

(*b*) No such corporation shall be organized without the approval of the orphans' court having jurisdiction of the accounts of such fiduciaries first had and obtained, upon petition filed setting forth all the facts and circumstances and the proposed terms and conditions of the organization. Such notice as shall be prescribed by said court

shall be given to all persons having any beneficial interest, vested or contingent, in the estate of the decedent, who are in being at the time of the filing of such petition; and the said court shall approve such organization only after inquiring into the circumstances and the proposed terms and conditions of such organization, aided, if necessary, by the report of a master, and only with the written consent of all persons interested who shall be sui juris, and of the guardians or committees of such as shall be under age or non compos mentis.

NOTE.—In this clause, the phraseology has been altered and the provisions of the Act of 1889 for the appointment of special guardians or committees in such proceedings and for the consent of the husbands of persons interested have been omitted.

(*c*) The stock of any such corporation issued to such fiduciaries shall be held by them for the same uses, trusts and persons as the estate and property were held before the organization of such corporation; they shall have the same right and power to vote such stock, subject to the same control by the court, as prescribed by Section 43 of this act regarding shares of stock belonging to the decedent; and they shall have the right to sell such stock under the direction of the court.

NOTE.—In this clause, "the stock of any such corporation issued to such executors," etc., has been substituted for "the whole of the proceeds of the trust estate, whether contributed or sold, and whether paid for by shares or money," and the provisions as to voting and sales have been added.

SECTION 43. Fiduciaries, whether appointed by last will and testament or by decree of the orphans' court, shall have the same right and power, either in person or by proxy, at all corporate meetings, to vote any and all shares of stock, held by them in a fiduciary capacity, in any corporation organized under the laws of this commonwealth, as the deceased, or legal owner thereof had in his

lifetime. And where such stock is registered on the books of such corporation in the name of, or has passed by operation of law or by virtue of any last will and testament to more than two fiduciaries, and dispute shall arise among them, the said shares of stock shall be voted by a majority of such fiduciaries, and in such manner and for such purposes as such majority shall authorize, direct or desire the same to be voted. If the number of fiduciaries shall be even and they shall be equally divided upon the question of voting such stock, it shall be lawful for the orphans' court having jurisdiction of their accounts, upon petition filed by any of such fiduciaries or by any party in interest, to direct the voting of such stock in the manner which, in the opinion of said court, will be for the best interests of the parties beneficially interested in the stock.

NOTE.—This is Section 1 of the Act of March 16, 1905, P. L. 42, 5 Purd. 5890, altered by substituting "fiduciaries" for "executors, administrators, guardians and trustees," and "the orphans' court" for "the proper court," and by omitting, after "lifetime," in line 8, the words, "or during his legal ownership thereof," which seem not to apply to trusts within the scope of the present draft.

The Act of 1905 is apparently intended to include trustees appointed by the common pleas, though it makes no provision as to trustees appointed by deed. The act should be repealed only so far as relates to fiduciaries who are within the scope of the present act.

The expression "any corporation in this commonwealth or organized under the laws of the same" has been changed to "organized under the laws of this commonwealth," and "certified, or stands on the books" has been changed to "registered on the books." The last sentence is new.

SECTION 44 (*a*) No executor or administrator shall be liable to pay interest but for the surplusage of the estate remaining in his hands or power when his accounts are or ought to be filed: *Provided*, That nothing herein contained shall be construed to exempt an executor or administrator from liability to pay interest, where he may have made use of the funds of the estate for his own purposes.

NOTE.—This is Section 17 of the Act of March 29, 1832, 1 Purd. 1125 (Section 18 of the Commissioners' Draft). It was derived, as to the first sentence, from Section 6 of the Act of March 27, 1713, 1 Sm. L. 81, which, however, included the words "guardian or trustee." The proviso was new in the Act of 1832.

The Commissioners of 1830 reported that this section ought not to include guardians or trustees, "inasmuch as they are liable for interest upon entirely different principles, and not merely after the period when their accounts 'are or ought to be settled.' "

The changes now made are: to substitute "filed" for "settled and adjusted," to omit "in the register's office," after "filed;" and to omit, at the end, "previously to the time when his accounts are or ought to be filed as aforesaid."

(*b*) The amount of interest to be paid in all cases by fiduciaries shall be determined by the orphans' court, under all the circumstances of the case, but shall not, in any instance, exceed the legal rate of interest for the time being.

NOTE.—This is Section 18 of the Act of March 29, 1832, 1 Purd. 1126 (Section 19 of the Commissioners' Draft), which was new in that act.

The only change is to substitute "fiduciaries" for "executors, administrators and guardians."

SECTION 45. In all cases where the same person shall, under a will, fulfill the duties of executor and trustee, it shall not be lawful for such person to receive or charge more than one commission upon any sum of money coming into or passing through his hands, or held by him for the benefit of other parties; and such single commission shall be deemed a full compensation for his services in the double capacity of executor and trustee: *Provided*, That any such trustee shall be allowed to retain a reasonable commission on the income he may receive from any estate held by him in trust as aforesaid.

NOTE.—This is Section 1 of the Act of March 17, 1864, P. L. 53, 1 Purd. 1127.

The words "income" and "estate" are substituted for "interest" and "sum" in the last two lines.

SECTION 46 (*a*) It shall be the duty of every executor and administrator to file in the register's office a just account of the administration of the estate at the expiration of six months from the time of administration granted or when thereunto required by the orphans' court, and any executor or administrator may be cited to file his account, after the expiration of six months from the date of issuance of letters testamentary or of administration, on petition of any person having an interest, present or future, vested or contingent, in the estate of the decedent, or on petition of any creditor of the decedent.

NOTE.—The first part of this clause is derived from Section 15 of the Act of March 15, 1832, 1 Purd. 1089, but the period is reduced from one year to six months, "at the expiration of" is substituted for "within," and "required by the orphans' court" for "legally required." The remainder of the clause is new, is declaratory of the existing law, and embodies the provisions of the first part of Section 1 of the Act of April 17, 1869, P. L. 70, 1 Purd. 1138, which enables the owner of any contingent interest in the personal property of any decedent to require an executor or administrator to file his accounts.

The remainder of that section, enabling the owner of a contingent interest to require the legatee of any previous interest in the same property to give security, is covered by Section 23 of the present draft.

Formerly the term of one year was perhaps a convenient period for filing an account, but under modern conditions of rapid communication and transportation, it is no longer necessary or advisable. The majority of estates can now be settled by the end of six months, and it is often a great hardship to legatees and creditors to compel them to wait for a full year before their just claims can be satisfied. And where the estate is so complicated that a final account cannot be rendered at the end of six months, a partial account may be filed, debts paid or at least ascertained with some degree of certainty, and the will construed by the court at the audit of the account.

The Commissioners are of opinion that this shortening of the term will be of great advantage.

(*b*) The several orphans' courts of this commonwealth shall have power, by general rule or special order, to ap-

point one or more examiners to make periodical or special examinations of the assets of estates in the hands of fiduciaries, and power to require all persons in whose custody or control such assets may be held, to present them for such examination. The examiners so appointed shall be compensated by reasonable fees to be fixed by the court and to be paid out of the respective estates.

NOTE.—This is a new section.

At present the orphans' court has not explicitly been given this general power, and the deplorable cases of embezzlement, especially by trustees, that occur from time to time have induced the Commissioners to recommend this provision as at least a partial preventative.

(*c*) The several orphans' courts of this commonwealth shall by general rule provide that any person who, claiming to be interested in the estate of any decedent as creditor, legatee, next of kin or otherwise, has given written notice of his claim to the executor, administrator or trustee, or his attorney, shall be entitled to receive actual notice from said executor, administrator or trustee, or his attorney, of the filing of his account; or such rule of court may provide for the filing of such claims with, and the giving of notice by, the register of wills or the clerk of the orphans' court.

NOTE.—This is a new clause.

The attention of the Commissioners has been called by numerous suggestions from members of the Bar to the advisability of a provision of this nature. It is certainly fair and conducive to an orderly procedure in the settlement of decedents' estates that a creditor or other person interested, who has given notice of his claim, should be apprised of the filing of the account. The Commissioners are of opinion that it is better to provide for the procedure by rules of court than by a peremptory statute, as the comparative elasticity of rules of court will enable the court to arrive at a just result in each particular case.

(*d*) Every register, with whom an account has been or shall be filed, shall transmit the same to the orphans' court of the respective county, at its next stated meeting, being not less than thirty days distant from the time of such filing, of all which he shall give notice to all persons concerned, in the following manner, viz.: by an advertisement enumerating all the accounts to be presented at any one time to the said court, in at least two secular newspapers, if there be two, published in the respective county, or if there be but one newspaper published in such county, then in that one, or if there be none, then in one printed nearest to the said county, at least once a week during the four weeks immediately preceding the meeting of the court at which such account shall be presented, setting forth, in substance, that the accountants, naming them and the character in which they respectively act, have filed their accounts in the office of the said register, and that the same will be presented to the orphans' court for confirmation, at a certain time and place, mentioning the same; and also by setting up conspicuously in his office, and in at least six other of the most public places in the county, at least four weeks before the time appointed for the presentation of such accounts as aforesaid, fairly written or printed copies of such advertisement. The actual expenses of such advertisement, according to the usual rates of advertising in such newspapers, and the setting up of such notices, shall be divided among all the accounts presented at the same court, and the proper portion only shall be charged in any of the said accounts, and allowed to the register as the cost of such advertisement and notices.

NOTE.—This is Section 30 of the Act of March 15, 1832, 1 Purd. 1125 (Section 37 of the Commissioners' Draft, except that the provision as to counties where no newspaper is published was added in the Act of 1832). It was derived with slight alterations from the Acts of April 4, 1797, Section 9, 3 Sm. L. 296, and April 1, 1823, Section 1, P. L. 286. The insertion of the word "secular" in line 8 covers the provision of the Act of April 15, 1867, P. L. 86, 1 Purd. 1125, note (*o*).

Section 29 of the Act of March 15, 1832, P. L. 143, 1 Purd. 1125, providing that the register, "before he shall allow the accounts of any executor or administrator, shall carefully examine same, and require the production of the necessary vouchers, or other satisfactory evidence of the several items contained in it," is recommended for repeal, the practice prescribed having fallen into disuse.

(*e*) When any of the heirs, legatees, distributees or creditors of a decedent reside out of this state, or out of the United States, or from other circumstances it may be expedient that additional or further notice should be given of the settlement of the account of a fiduciary, or of the disposition of the assets or surplusage of the estate, it shall be in the discretion of the orphans' court to require such further or additional notice to be given by such accountant, as they may think proper, to appear in court, or before the auditor or auditors by them appointed as the case may be, at such times as shall be fixed for the examination of such account, or for the distribution of the assets or the surplusage of the estate.

NOTE.—This is Section 20 of the Act of March 29, 1832, 1 Purd. 1127 (Section 21 of the Commissioners' Draft), which was new in the Act of 1832. The only change now made is to substitute "fiduciary" for "executor, administrator, guardian or trustee," and to insert "auditor or" before "auditors."

(*f*) No account of an executor, administrator or guardian shall be confirmed and allowed by the orphans' court, unless it shall appear, at the presentation of such account, that notice of such presentation has been given, conformably to the directions of this act.

NOTE.—This is Section 15 of the Act of March 29, 1832, P. L. 193, 1 Purd. 1125 (Section 16 of the Commissioners' Draft), which was new in the Act of 1832, although apparently in conformity with the then existing practice.

The only changes now made are to omit the reference at the end of the section to "An act relating to registers and registers' courts," (the provisions of that act being now incorporated in the present act), and to omit, after

"orphans' court" in the third line, the words "except in the cases herein especially provided for."

(*g*) All trustees who are subject to the jurisdiction of the orphans' court shall file their accounts in the court appointing them or, in the case of testamentary trustees, in the orphans' court of the county where the will is or shall be probated. The orphans' court shall have exclusive jurisdiction of the accounts of all trustees appointed by such court, and of all testamentary trustees, whether such trusts are vested in executors or administrators virtute officii or in trustees named in the will, saving, however, the jurisdiction of the courts of common pleas under existing laws in cases of trustees who have filed their accounts in such courts before the approval of this act, and cases of substituted testamentary trustees appointed by any court of common pleas before the approval of this act.

NOTE.—The first part of this clause is derived from Section 1 of the Act of May 3, 1909, P. L. 391, 6 Purd. 6565, altered so as to apply only to trustees who are within the scope of the present act, and to provide in what courts the accounts shall be filed. The remainder of the clause is new and is intended to take away the concurrent jurisdiction of courts of common pleas in cases of testamentary trusts in persons named in the will. This jurisdiction as to trusts nominatim was conferred by Section 15 of the Act of June 14, 1836, P. L. 632, 4 Purd. 4880, upon the court of common pleas of the county where the trustee resided at the commencement of the trust, and was held to be concurrent in Brown's Appeal, 12 Pa. 333, although as to trusts virtute officii the jurisdiction of the orphans' court is exclusive: Innes's Estate, 4 Whart. 179; Baird's Case, 1 W. & S. 288. In Anderson *vs.* Henzey, 7 W. N. C. 39, it was remarked that the safest course was to invoke the aid of the orphans' court in all cases of testamentary trusts. The jurisdiction of the common pleas has been rarely exercised in recent years, and the late decision of the supreme court in Simpson's Estate, 253 Pa. 217, reversing 23 Dist. Rep. 750, brought the matter to the attention of the Commissioners, who are of opinion that there is now no good reason why the jurisdiction of the orphans' court should not be made exclusive as to both classes of testamentary trusts.

(*h*) All trustees who are subject to the jurisdiction of the orphans' court may hereafter, triennially, from the date of their appointment, file their accounts in said court, which accounts shall be duly audited, and confirmed absolutely to that date. This clause shall apply to and permit all such trustees, who have been acting in such capacity for more than three years before the passage of this act, to file their accounts, which shall be audited and confirmed absolutely to the date of such filing, and, in like manner, to file their accounts triennially thereafter.

NOTE.—This is also derived from Section 1 of the Act of May 3, 1909, P. L. 391, 6 Purd. 6565. The law prior to the Act of 1909 did not expressly permit trustees to file triennial accounts, and it is considered best to authorize in terms the practice that has been followed in many parts of the State. The Act of 1909 applies to "all trustees of estates and all committees of the estates of lunatics and habitual drunkards," and it has been thought that it was intended to include only trustees of the estates of lunatics and habitual drunkards.

(*i*) Due notice of the filing of any account of a trustee in the orphans' court of any county shall be given by advertisement as prescribed by rule of said court, and in such other manner as the said court may, in each particular case, direct, to all persons interested in the estate; and absolute confirmation of such account shall not be entered unless all such persons interested are legally competent and qualified, either personally or by their guardians or committees, to appear in court and object to said account if they so desire.

NOTE.—This is founded on the second proviso to Section 1 of the Act of May 3, 1909, P. L. 391, 6 Purd. 6565, broadened so as to apply to all accounts of trustees and not merely triennial accounts, and modified so as to provide for notice by advertisement and such other notice, if any, as the court may direct, instead of "due and actual notice."

SECTION 47 (*a*) The judges of the orphans' courts of this commonwealth, respectively, shall have power, and are hereby authorized, to establish, in their discretion, such rules and regulations as they may deem proper for the publication of advertisements of notices of the auditing of accounts of fiduciaries and shall have supervision of and regulate the cost of such publication in all such cases, as well by special order in particular cases, as by general rules.

NOTE.—This is Section 1 of the Act of March 18, 1875, P. L. 29, 3 Purd. 3370. In the first line, the word "separate" has been omitted. The section also provides for publication of notices of sales of real estate under proceedings in said court, notices to parties in proceedings in partition, and all other cases within their jurisdiction, and for the establishment of a bill of costs for services of clerks. Those parts of the section are covered in other places.

(*b*) In any county in which a separate orphans' court shall be established, all accounts filed in the office of the register of wills, or in the orphans' court by fiduciaries, shall be examined and audited by the court, without expense to the parties, except where all parties in interest in a pending proceeding shall nominate an auditor, whom the court may, in its discretion, appoint.

NOTE.—This is the proviso to Section 6 of the Act of May 19, 1874, P. L. 207, 3 Purd. 3369, which was passed in pursuance of Article V, Section 22 of the Constitution of 1874. The words "by fiduciaries" have been added in line 3, and "examined and" in line 4.

(*c*) In any county in which a separate orphans' court shall not be established, all accounts filed in the office of the register of wills or in the orphans' court by fiduciaries shall be examined by the court, and, if not excepted to, shall, after due consideration, be confirmed. If any person interested in the estate shall except to the account, or any of the parties shall desire to refer the

account to an auditor, the court shall decide whether the matter calls for such reference; and if so, the court may appoint a suitable person as auditor. The auditor so appointed shall be sworn or affirmed to perform his duties with fidelity, and shall have power to administer oaths or affirmations to parties and witnesses in the matter referred to him.

NOTE.—This is Section 1 of the Act of April 14, 1835 P. L. 275, 1 Purd. 1126, altered by confining it to counties having no separate orphans' courts, by providing for the appointment of one auditor only and by omitting the proviso, which reads: "*Provided*, That the provisions of this section shall not extend to the city and county of Philadelphia," and was extended to Montgomery County by the act of February 18, 1869, P. L. 183. The provision for appointment of auditors by the parties has also been omitted, and some changes have been made in the phraseology.

The provisions of this clause supersede Section 16 of the Act of March 29, 1832, 1 Purd. 1126, which is therefore recommended for repeal.

The Commissioners recommend the repeal, so far as relates to the orphans' court, of the Act of April 1, 1909, P. L. 95, 6 Purd. 7296, as to choice of auditors, etc., by the parties (held unconstitutional in Hicks's Estate, 19 Dist. Rep. 410); and the Act of June 4, 1879, P. L. 84, 1 Purd. 390, as to compensation of auditors.

SECTION 48. Within five years after the final decree, confirming the original or supplementary account of any fiduciary, which has been or may be hereafter passed, upon petition of review being presented by such fiduciary or his legal representatives, or by any person interested therein, alleging errors in such account, or in any adjudication of the orphans' court or any report of an auditor on such account, which errors shall be specifically set forth in said petition of review, said petition and errors being verified by oath or affirmation, the orphans' court shall grant a rehearing of so much of said account, adjudication, or auditor's report, as is alleged to be error in said petition of review, and give such relief as equity and

justice may require, by reference to auditors, or otherwise, with like right of appeal to the proper appellate court as in other cases: *Provided*, That this act shall not extend to any cause when the balance found due shall have been actually paid and discharged by any fiduciary.

NOTE.—This is Section 1 of the Act of October 13, 1840, P. L. (1841) 1, 1 Purd. 1128, changed by substituting the words "proper appellate" for "supreme," and by omitting "as aforesaid" after "hereafter passed."

The word "fiduciary" is substituted for "executor, administrator or guardian," making the act include testamentary trustees. A provision is inserted making the review include adjudications and auditors' reports.

SECTION 49 (*a*) No executor or administrator shall be compelled to make distribution of the estate of his testator or intestate until six months be fully expired from the granting of the letters testamentary or of administration in the estate. After the expiration of said period, distribution may be ordered by the orphans' court having jurisdiction of the accounts of the executor or administrator, on petition of any person having an interest in the assets to be distributed, or on petition of any creditor of the decedent.

NOTE.—This is a modification of Section 38 of the Act of February 24, 1834, 1 Purd. 1130, which related to administrators only. It was copied from Section 15 of the Act of April 19, 1794, 3 Sm. L. 143, except that under the Act of 1794 the year ran from the death of the intestate.

The period has now been reduced to six months. Section 47 of the Act of 1834, 1 Purd. 1131, which is set forth below, after clause (*d*), applied to executors.

The Commissioners recommend the repeal of the first part of Section 19 of the Act of March 29, 1832, P. L. 194, 1 Purd. 1127, providing for the appointment of auditors in insolvent estates "to settle and adjust the rates and proportions of the assets to and among the respective creditors, according to the order established by law," and the last part of Section 1 of the Act of April 13, 1840, P. L. 319, 1 Purd. 1127, providing for the appointment of auditors to make distribution on the application of any legatee, heir or other person interested.

(*b*) Executors or administrators may make distribution, and pay or deliver legacies, without the audit of their accounts, upon such security as may be satisfactory to them, nevertheless at their own risk, but without liability to any creditors of the decedent who shall not have given written notice to the executor or administrator within six months after the granting of letters testamentary or of administration, provided that such executor or administrator has complied with the provisions of Section 10 of this Act. Where distribution of a decedent's estate is awarded by the orphans' court, after audit and confirmation of any account of the executors or administrators, such decree of distribution shall protect the executors or administrators from personal liability with respect to the property so distributed. In making distribution under such a decree, the executors or administrators shall not be entitled to demand refunding bonds from the distributees, except in the cases specially provided for by this act, and in other cases in which the court shall direct the giving of refunding bonds.

NOTE.—This is a new clause. The first sentence is founded upon Section 58 of the Act of 1834, 1 Purd. 1132, which was derived from Section 16 of the Act of 1794. It is here altered by substituting "the audit of their accounts" for "application as aforesaid," and by adding the words beginning "but without liability."

The remainder of the section as drafted is declaratory of the law as laid down in the decisions: Ferguson *vs.* Yard, 164 Pa. 586; Lejee's Estate, 5 D. R. 311; Piper's Estate, 208 Pa. 636.

Section 57 of the Act of 1834, 1 Purd. 1131, provides: "Executors, or administrators making distribution, or paying or delivering any legacy as aforesaid, shall not be liable for the assets so paid or distributed in respect to any claim or demand upon the decedent not previously made known to them, where security shall be taken, as is hereinbefore provided." This, eliminating the requirement of security, is covered by the new clause.

Section 41 of the Act of 1834, 1 Purd. 1131, which required refunding bonds to be given by distributees in all cases, has become obsolete and its repeal is recommended.

It was derived in part from Section 15 of the Act of 1794.

(*c*) When the personal estate of a decedent does not exceed the value of three hundred dollars, the executor or administrator may, after the expiration of one year after the date of granting the letters testamentary or of administration, present his petition to the proper orphans' court, with an annexed account showing the administration and legal distribution of the estate, the statements in the petition and the account to be verified by the affidavit of such executor or administrator. Thereupon the court may, upon satisfactory proof or acknowledgment of notice to all parties known to be interested in said estate that said petition and account have been presented, order, at the end of thirty days from the date of filing the petition and account, the discharge of the executor or administrator and his sureties from future liability, without the expense of proceedings as in a formal account, unless during said period of thirty days exceptions be filed to the account.

NOTE.—This is Section 1 of the Act of May 6, 1915, P. L. 265, 5 Purd. 5895, changed by inserting "personal", in the first line, by adding "and his sureties from future liability," and by altering the language at the end, so as to make it clear that discharge may be made at the end of the thirty days, unless meanwhile exceptions are filed.

(*d*) No creditor of a decedent who shall neglect or refuse to present his claim at the audit of the account of the executor or administrator, held not less than six months after the grant of letters testamentary or of administration of which public notice has been given as provided in Section 10 of this act, or at an audit held after actual notice to such creditor of the filing of such account, as provided in Section 46, clause (*c*) of this act, shall be entitled to receive any share of the assets distributed in pursuance of such audit, whether the estate of the decedent be solvent or insolvent.

NOTE.—This is founded on the proviso to Section 19 of the Act of March 29, 1832, P. L. 194, 1 Purd. 1127,

which has been redrafted to correspond to the changes made in previous sections.

The Commissioners recommend the repeal of the following sections of the Act of February 24, 1834, as obsolete and unnecessary:—

Section 39, 1 Purd. 1130, providing that when distribution shall be required by any person interested, the executor or administrator shall present to the court "a statement of all demands against the estate which have been made known to him, and after deducting the amount thereof from the assets in his hands, together with such further sum as may be necessary to pay the interest and costs of suit of such as may be in dispute, and of such as he may deem it his duty to dispute, make distribution of the residue under the direction" of the court.

Section 40, 1 Purd. 1131, providing that after six months from a distribution made as aforesaid, like proceedings may be had for distribution of further assets, and so from time to time, until the whole estate shall be distributed.

Section 47, 1 Purd. 1131, providing that after one year from the granting of administration, executors shall, on the requisition of any legatee or any other person interested, pay and deliver, under the direction of the court, all legacies due and payable, or a proportionate part thereof, first deducting all demands against the estate and such sums as may be necessary to pay the interest and costs of such as are disputable or in dispute, and shall also distribute any residue distributable under the intestate laws.

(*e*) 1. Whenever it shall appear at the audit and distribution of an estate in the orphans' court, that the balance, after payment of debts, includes stocks, bonds, or other securities, which, for reasons satisfactory to said court, have not been converted by the accountants, it shall be lawful for said court to direct distribution of such assets in kind to and among those lawfully entitled thereto, including fiduciaries.

NOTE.—This is Section 1 of the Act of June 10, 1911, P. L. 870, 5 Purd. 5895, with the addition of the words "including fiduciaries."

2. Where stocks, bonds, or other securities have been distributed in kind, as above provided, to any fiduciary,

it shall be the duty of such fiduciary to use reasonable diligence in converting such securities as shall not be investments now or hereafter authorized by law; and if such fiduciary be doubtful as to the propriety of making sale of such securities, he may apply to the orphans' court having jurisdiction of his accounts, by petition, for authority and direction to sell the same; whereupon, after due notice to all parties interested, the said court shall make such order in the premises as to it may appear proper.

NOTE.—This is Section 2 of the Act of 1911, with the substitution of the word "fiduciary" for "guardian, trustee, or other fiduciary," and some slight verbal changes.

This section is intended to cover the case where securities distributed in kind to a fiduciary are not legal investments but their immediate sale would result in substantial losses and the fiduciary might, except for the provisions of this section, be compelled to make the sale forthwith on his own responsibility.

Section 3 of the Act of 1911 validated previous distributions and its re-enactment is unnecessary.

(*f*) It shall be lawful for any employer in this commonwealth at any time not less than thirty days after the death of his employee to pay all wages due to such deceased employee to the wife, children, father or mother, sister or brother (preference being given in the order named) of the deceased employee, without requiring letters testamentary or of administration to be issued upon the estate of said deceased employee, where such wages due do not exceed seventy-five dollars in amount. If such deceased employee shall not leave a wife or any of said relatives surviving him, then it shall be lawful for the employer in like manner to pay such wages to the creditors of the decedent, as follows: undertaker, physician, boarding-house keeper, and nurse, each his or her pro rata share, upon affidavit of fact furnished. The payment of such wages as aforesaid shall be a full discharge and release to the employer from any further claim for such wages.

NOTE.—This is founded on the Act of May 23, 1907, P. L. 201, 7 Purd. 7729.

SECTION 50 (*a*) Where any fiduciary has been required, or hereafter shall be required, upon the receipt of money, to give a refunding bond, it shall be lawful for such fiduciary, upon paying over such money to creditors, or to parties beneficially interested, to require, under the direction of the orphans' court having jurisdiction of his accounts, a bond, refunding receipt or other obligation from each person receiving such money, to indemnify such fiduciary to the amount such person may receive.

NOTE.—This is Section 1 of the Act of April 13, 1859, P. L. 604, 1 Purd. 1132, modified by substituting "fiduciary" for "executor, administrator or guardian," and "the parties beneficially interested" for "heirs, legatees or ward."

The Act of June 10, 1881, P. L. 106, 1 Purd. 1132, note (*m*) amended the Act of 1859 by adding a clause authorizing a ward who had reached lawful age and was a married woman to give her own refunding bond. This is now omitted as unnecessary since the married women's acts. For the same reason, Section 4 of the Act of April 11, 1856, P. L. 315, 3 Purd. 2454, authorizing a married woman entitled to a legacy or distributive share to give a refunding bond and to execute all other instruments and perform all other acts on payment to her of moneys so distributed, is recommended for repeal.

(*b*) In all cases where refunding bonds shall be given upon the distribution of the estate of any decedent, no action or suit thereon shall be brought after the expiration of six years from the date of such bond: *Provided*, That where the creditors or other persons entitled to the protection of said bonds, shall be within the age of twenty-one years, non compos mentis, imprisoned, or from or without the United States of America, or where a creditor whose debt shall not mature within such period, shall file within the said period in the office of the clerk of the orphans' court where said distribution shall have been made, a copy or particular statement of

any bond, covenant, debt or demand upon which his claim arises, then and in any such cases an action may be brought by the creditor at any time not exceeding two years from the coming of age, or removal of such disability of the creditor or other person entitled to the protection of said bonds, or the maturing of the debt or demand aforesaid.

NOTE.—This is Section 1 of the Act of June 30, 1885, P. L. 203, 1 Purd. 1132. The only changes are to omit after "distribution" in line 2, the words, "or partition," to substitute "the orphans' court where said distribution shall have been made" for "said court," no court having been previously referred to, and to insert "or other persons entitled to the protection of said bonds," and to make the period of limitation six years instead of five.

Section 2, which gave five years from the passage of the Act to sue on bonds theretofore given, need not be reenacted.

SECTION 51 (*a*) It shall be the duty of the prothonotaries of the courts of common pleas to file and docket, whenever the same shall be furnished by any parties interested, certified transcripts or extracts from the record showing the amount appearing to be due from, or in the hands of any fiduciary, on the settlement of his accounts in the orphans' court of the same or any other county, or by virtue of a decree of said court, which transcripts or extracts, so filed, shall constitute judgments, which shall be liens against the real estate of such fiduciary from the time of such entry until payment, distribution or satisfaction. Executions may be issued thereon out of said court of common pleas against the real estate only of such fiduciary, by any person or persons interested, for the recovery of so much as may be due to them respectively. The liens of such judgments shall cease at the expiration of five years from the time of the entry aforesaid, unless revived by scire facias in the manner by law directed in the cases of judgments in the courts of common law.

In case of an appeal from the orphans' court, the judgment shall be for no more than the amount finally

decreed by the appellate court to be due, and it shall be the duty of the prothonotary of the common pleas, on such decree of the appellate court being certified to him, to enter on his docket the amount so found due and decreed by the appellate court. If such amount be greater than that decreed by the orphans' court, the judgment for such excess shall take effect only from the time of entering the decree of the appellate court; but if the amount be reduced by the final decree of the appellate court, the prothonotary shall reduce the amount originally entered on his judgment docket and index accordingly; and such final decree, upon appeal, being certified and filed in said court of common pleas, the said term of five years shall be counted from the time of such entry.

NOTE.—This is Section 29 of the Act of March 29, 1832, 1 Purd. 1128 (Section 30 of the Commissioners' Draft), as amended by Section 1 of the Act of April 27, 1909, P. L. 202, 5 Purd. 5894.

The section is now changed by omitting "of the respective counties" after "common pleas" in line 2, by substituting "the" for "any" before "orphans' court" in line 7, and by inserting "of the same or any other county" after "orphans' court," the purpose of these changes being to permit the filing of transcripts in other counties, thus supplying, so far as it relates to the orphans' court, the Act of June 5, 1885, P. L. 78, 2 Purd. 1426.

The section is further altered by substituting "fiduciary" for "executor, administrator, guardian, or other accountant," by inserting the words "or by virtue of a decree of said court," "which shall be liens" and "the real estate of," by striking out the provisions as to execution, attachment, and actions of debt and scire facias, and inserting "and executions may be issued thereon out of said court of common pleas against the real estate only of such fiduciary." The Commissioners have considered it proper to recommend these changes so that the remedy against real estate shall be exclusively in the common pleas and executions against personalty shall issue from the orphans' court only. Corresponding changes are recommended in the Orphans' Court Act, and a similar section has been there drafted to permit the filing in the common pleas of transcripts of orders of the orphans' court for the payment of money by others than fiduciaries.

Section 29 of the Act of 1832 was derived, as to the first part, from Section 2 of the Act of April 1, 1823, P. L. 286. The provisos were new in the Act of 1832.

The Act of 1909 amended Section 29 of the Act of 1832 so as to provide that the transcripts should constitute "judgments" instead of "liens," and so as to provide for execution and attachment execution thereon. The Commissioners recommend the repeal of the Act of 1909, except as to the validating provisions, etc., added by the Act of 1909, as follows:

"And all executions, attachment executions, and other process heretofore issued out of any of the courts of common pleas of this commonwealth, upon any such certified transcripts or extracts from the records of any of the orphans' courts of this commonwealth, if otherwise valid, and if otherwise duly issued and served as provided by law, are hereby declared to be, and shall be deemed and held to be lawful and valid, and no defendant, garnishee, or other person shall be permitted to make or take any objection, exception, plea, or defense to the same; nor shall any objection, exception, plea, or defense heretofore made to the same be deemed lawful, valid, or effectual, because or on the ground that there was at the time of issuing any such process, as aforesaid, no sufficient or valid judgment upon which such process might be issued; and the provisions hereof shall be held applicable to all actions, suits, and proceedings heretofore commenced or instituted, as well as to all such actions, suits, and proceedings as shall be hereafter commenced or instituted.

Nothing herein contained shall apply to or affect any actions, suits, or proceedings heretofore commenced or instituted, and upon which final judgment or decree of the supreme or superior court has been entered, or as to which any court of common pleas has entered its judgment or decree, and the time for an appeal therefrom has elapsed."

(*b*) When the fiduciary shall have fully paid and discharged the amount of such judgment, the parties who have received payment shall acknowledge satisfaction thereof, on the record of the court of common pleas. In case of neglect or refusal so to do, for the space of thirty days after request in writing and tender of all the costs, the orphans' court, on due proof to them made that the entire amount due from such fiduciary, according to the final settlement of the said account, has been

fully paid and discharged, may make an order for his relief from such recorded judgment, which order, being certified to the court of common pleas, shall be entered on their records, and shall operate as a full satisfaction and discharge of such judgment.

NOTE.—This is Section 30 of the Act of March 29, 1832, 1 Purd. 1128 (Section 31 of the Commissioners' Draft), as amended by Section 2 of the Act of April 27, 1909, P. L. 202, 5 Purd. 5894.

Section 30 was new in the Act of 1832. The change made by the amendment of 1909 was merely to substitute "judgment" for "lien." The term "fiduciary" is now substituted for the words "executor, administrator, guardian, or other accountant," and "operate" for "inure and be received." The words "to the extent of what they have received" are omitted after "thereof" in line 4. The provision for a penalty of fifty dollars and damages for neglect or refusal to satisfy has been omitted, the remedy in the orphans' court being considered sufficient.

SECTION 52 (*a*) Any fiduciary whose accounts shall have been settled and confirmed and who shall have paid and transferred the remainder of the property in his hands to his successor in the administration or trust, if any, or to the persons legally entitled thereto, may, on petition, be discharged by the orphans' court having jurisdiction of his accounts from the duties of his appointment; and his sureties may be discharged from future liability with respect thereto: *Provided*, That in every case of the petition of a guardian for his discharge during the minority of his ward, it shall be the duty of the court to appoint some suitable person to appear and act for the ward in respect thereto.

NOTE.—This is a combination of Section 21 of the Act of March 29, 1832, 1 Purd. 1138, and Section 11 of the same act, 1 Purd. 1087, relating to discharge of guardians. The phraseology is altered and the section is extended to testamentary trustees. The provision as to discharge of sureties has been added.

Section 21 of the Act of 1832 was derived from the first paragraph of Section 3 of the Act of April 4, 1797, 3 Sm. L. 296. Section 11 was founded on Section 4 of the Act of March 30, 1821, P. L. 153.

(*b*) Whenever one or more of several joint fiduciaries shall die or be discharged or removed by the proper orphans' court, the said court, upon the application of any party interested, shall have power to discharge from future liability said discharged or deceased fiduciary and his surety or sureties, and require new or additional security of the remaining fiduciary or fiduciaries, with a like result in case of failure to comply as is provided by this act when new or additional security is, for any cause, required by such court: *Provided*, That such discharge shall not affect liabilities existing at the time of the discharge of such fiduciary or fiduciaries, surety or sureties.

NOTE.—This is Section 1 of the Act of February 2, 1853, P. L. 31, 1 Purd. 1138, changed by extending it to all fiduciaries instead of administrators only. Various alterations have been made in the phraseology, especially by substituting "security" for "surety."

SECTION 53 (*a*) Any orphans' court having jurisdiction of the accounts of executors, administrators, guardians or trustees shall have exclusive power to remove such executor or administrator and vacate the letters testamentary or of administration or to remove such guardian or trustee, as the circumstances of the case may require, in any of the following cases:

1. When such fiduciary is wasting or mismanaging the estate or property under his charge, or is like to prove insolvent, or has neglected or refused to exhibit true and perfect inventories, or render full and just accounts of such estate or property, come to his hands or knowledge;

2. When such fiduciary has been duly declared a lunatic, habitual drunkard or weak-minded person;

3. When such fiduciary has become incompetent to discharge the duties of his trust, by reason of sickness or

physical or mental incapacity, and it shall appear to the satisfaction of the court that such incompetency is likely to continue, to the injury of the estate under his control;

4. When such fiduciary has removed from this state, or has ceased to have any known place of residence therein, during the period of one year or more;

5. When any guardian, whether testamentary or otherwise, mismanages the minor's estate or misconducts himself in respect to the maintenance, education or moral interests of the minor;

6. When such fiduciary fails or neglects to pay over the principal or income of the estate, according to his duty under the trust, or fails or neglects to comply with any order or direction of the court made in relation to said trust;

7. When any trustee of property held in trust under the provisions of any last will and testament for religious, educational or charitable purposes, or for use as a burying-ground, neglects or abuses such trust;

8. When, for any reason, the interests of the estate or property are likely to be jeopardized by the continuance of any such fiduciary.

9. When all the cestuis que trust, or a majority of them, having the life estate under any trust, shall desire the removal of the trustee or trustees upon any substantial ground not hereinbefore enumerated, and the court, upon petition filed by them or any of them, shall be satisfied that such substantial ground for removal exists, in which case, the court may remove said trustee or trustees and appoint another or others as chosen by said parties.

Provided, however, That nothing herein contained shall be construed to affect the jurisdiction of any court of common pleas in proceedings pending at the date of the approval of this act.

NOTE.—In this section, there have been collected all the various causes for removal by the court of executors, administrators, guardians and trustees.

In line 3, the word "exclusive" has been inserted, in order to take away the seldom-exercised concurrent

jurisdiction of the court of common pleas to remove testamentary trustees. This involves the repeal of Section 12 of the Act of March 11, 1836, P. L. 79, 4 Purd. 4887, and of Sections 16 to 21 inclusive of the Act of June 14, 1836, P. L. 633, 4 Purd. 4887-8, the latter, however, only so far as they relate to testamentary trustees. The proviso is added to save the jurisdiction of the court of common pleas in pending cases.

Paragraph 1 is derived from Section 22 of the Act of March 29, 1832, 1 Purd. 1139, with the substitution of the word "mismanaging" for "misplacing;" Section 1 of the Act of April 22, 1846, P. L. 483, 1 Purd. 1142; Section 1 of the Act of April 7, 1859, P. L. 406, 1 Purd. 1143, which extended the Act of 1832 to cases of trustees; and Section 1 of the Act of May 1, 1861, P. L. 680, 1 Purd. 1141.

Paragraph 2 is derived from Section 26 of the Act of 1832, 1 Purd. 1140, with the addition of the words "or weak-minded person."

Paragraph 3 is derived from Section 2 of the Act of May 1, 1861, P. L. 680, 1 Purd. 1142, with some changes in phraseology, the omission of the word "sole," and the substitution of "other cause" for "other visitation."

Paragraph 4 is derived from Section 27 of the Act of 1832, 1 Purd. 1140.

Paragraph 5 is derived from Section 12 of the Act of 1832, 1 Purd. 1087.

Paragraph 6 is derived from Section 1 of the Act of April 7, 1859, P. L. 406, 1 Purd. 1143.

Paragraph 7 is derived from Section 1 of the Act of February 17, 1818, P. L. 104, 4 Purd. 4886.

Paragraph 8 is derived from Section 1 of the Act of May 1, 1861, P. L. 680, 1 Purd. 1141.

Paragraph 9 is derived from Section 1 of the Act of April 9, 1868, P. L. 785, 4 Purd. 4893, which applies only to Philadelphia, modified so as to conform to the decision in Neafie's Estate, 199 Pa. 307.

This combination has been made in order to avoid unnecessary repetitions. The following clauses deal with the procedure common to all the cases above enumerated, and the next section covers the cases in which the court has power to require additional security.

(*b*) Whenever it shall be made to appear to the orphans' court having jurisdiction of the accounts of any fiduciary, on the oath or affirmation of any person interested, that

there exists any one or more of the grounds for removal of such fiduciary enumerated in the last preceding clause of this section, such court may issue a citation to such fiduciary, requiring him to appear on a day certain, to answer the charge so preferred, and may make all such necessary rules and orders as the said court may deem proper for bringing the matter complained of to a hearing. If, on such hearing, the said court shall be satisfied of the truth of the matters charged, it may remove such executor or administrator and vacate the letters testamentary or of administration or remove such guardian or trustee, as aforesaid, and direct the issuance of new letters testamentary or of administration, or appoint a new guardian or trustee, and make such orders for the security of the trust property and for the delivery of such property and the books, accounts, papers and moneys belonging or relating to the trust to the successor of such fiduciary as the circumstances of the case may require.

NOTE.—This is derived from Section 1 of the Act of May 1, 1861, P. L. 680, 1 Purd. 1141; Section 26 of the Act of 1832, 1 Purd. 1140; Section 12 of the Act of 1832, 1 Purd. 1087; and Section 1 of the Act of April 7, 1859, P. L. 406, 1 Purd. 1143.

(*c*) Any orphans' court having jurisdiction of the accounts of any fiduciary shall have power in a case of emergency, when the exigencies of the case shall appear to the satisfaction of the court to require it, in order that the rights of creditors and parties interested in the assets of the estate shall be protected, summarily to remove such executor or administrator and vacate the letters testamentary or of administration or summarily to remove such guardian or trustee, on any of the grounds enumerated in clause (*a*) of this section, and to direct the issuance of new letters or to appoint a successor to such guardian or trustee, on the ex parte petition of any creditor or party interested in the estate, and further to make such orders for the security of the trust property and for the delivery of such property and the books,

accounts, papers and moneys belonging or relating to the trust to the successor of such fiduciary as the circumstances of the case may require: *Provided*, That it shall be lawful for any such fiduciary, so removed, to apply by petition to said court to have such decree of removal vacated and to be reinstated in his office.

NOTE.—This clause is new and intended to supply an hiatus in the present law, which apparently does not fully provide for immediate relief where the fiduciary, for example, absconds and cannot be reached by citation or attachment.

(*d*) No decree removing one of several co-fiduciaries shall suspend the power or prejudice the acts of any of the other fiduciaries.

NOTE.—This is derived from the proviso to Section 27 of the Act of 1832, 1 Purd. 1140.

(*e*) If such superseded fiduciary shall neglect or refuse to comply with any order or decree of the court made under the provisions of this section, the court shall have power to enforce obedience thereto by attachment, with or without sequestration, execution or otherwise, as to such court shall seem necessary and proper for the due protection of the rights and interests of any and all parties interested; or the succeeding fiduciary may proceed at law against the superseded fiduciary and his sureties, if any there be, or against any other person who may be possessed of any goods or chattels belonging to the estate of the decedent or minor, as the case may be, or be indebted to him; or the remedies by execution and suit at law may be pursued at the same time, if the case so require, until the end be fully attained.

NOTE.—This is a combination of Section 24 of the Act of 1832, 1 Purd. 1139, and the last part of Section 1 of the Act of April 7, 1859, P. L. 406, 1 Purd. 1143.

SECTION 54 (*a*) 1. In any of the cases enumerated in Section 53, clause (*a*) of this act, the court may, upon the

return of the citation, require such security of an executor, or such other and further security of an administrator, guardian or trustee, as they may think reasonable, conditioned for the performance of the trust, which security shall be taken in the name of the commonwealth of Pennsylvania and filed in the said court, and shall be deemed and considered in trust for the benefit of all persons interested in such estate: *Provided*, That if it shall be made to appear to the said court that such fiduciary is about to remove from this commonwealth, or that the property under his charge may be wasted or materially injured before he can be reached by the ordinary process of the court, it shall be lawful for such court to issue a writ of attachment, under which the same proceedings may take place as in other cases of attachment on mesne process in the orphans' court; and on the return of such attachment, the court may proceed as on the return to the citation.

NOTE.—This is derived from Section 22 of the Act of March 29, 1832, 1 Purd. 1139. It is extended to all cases covered by clause (*a*) of Section 53 of the present draft, instead of merely the cases covered by paragraph 1 of that clause.

Section 25 of that act, 1 Purd. 1140, which was derived from the Act of March 27, 1713, 1 Sm. L. 81, provides that security may be required where "an executrix, having minors of her own, or being concerned for others, is married or like to be espoused to another husband, without securing the minors' portions, or real estates." Section 1 of the Act of April 25, 1850, P. L. 569, 1 Purd. 1141, amended the above section so as to "include all cases therein specified, whether there are minors concerned in the estate or not, and whether the executrix is sole executrix or otherwise."

This amendment leaves the section applicable to any case where an executrix "is married or like to be espoused to another husband." Since the married women's acts, there seems to be no occasion for this provision. The original section was apparently intended to cover the case where a widow, named as executrix, remarried or was about to remarry, and to protect the interests of minor children of the testator against the property rights which

would be acquired by the second husband. The repeal of Section 25 of the Act of 1832 and the amendment of 1850 is therefore recommended.

2. If such fiduciary shall neglect or refuse to give such security, or such further security, so ordered, then the said court may remove such executor or administrator and vacate such letters testamentary or of administration, or remove such guardian or trustee, and direct the issuance of new letters or appoint a new guardian or trustee as aforesaid.

NOTE.—This is derived from Section 23 of the Act of 1832, 1 Purd. 1139. "May remove" is substituted for "shall remove."

(*b*) Application may be made to the orphans' court, in any of the cases mentioned in clause (*a*) of Section 53 of this act, by any surety on the bond of such fiduciary, and upon the petition of such surety duly verified by oath or affirmation, the like proceedings may be had, for the purpose of compelling such fiduciary to give security, and thereupon the court may order such fiduciary to give such counter-securities as they shall judge necessary to indemnify the surety against loss by reason of his suretyship. If such fiduciary shall refuse or fail to give such security, within such reasonable time as the court shall order, it shall be lawful for the court to direct such fiduciary to pay or deliver over forthwith to such surety, or to some other person for him, all of the property, moneys, books, accounts and papers whatsoever for which such surety may be accountable or which may belong or relate to the trust: *Provided*, That such surety shall first give to the satisfaction of the court, sufficient security, faithfully to preserve and account therefor, and deliver and dispose of the same according to the order of the court.

NOTE.—This is Section 28 of the Act of 1832, 1 Purd. 1140, with some changes in phraseology, the substitution of "fiduciary" for "executor, administrator or guardian," and the extension of the provisions to all cases covered

by clause (*a*) of Section 53, instead of merely the cases covered by paragraph 1 of that clause.

(*c*) It shall be lawful for the orphans' court having jurisdiction of the accounts of any fiduciary, on the petition of any surety of such fiduciary, or of the personal representatives of a deceased surety, to issue a citation requiring such fiduciary, at the return thereof, not less than thirty days' notice to be given of the presentation of such petition, to file an account of his management of the trust or estate. The said citation, upon such petition, and affidavit filed of the facts connected with the execution and position of the trust funds or estate, shall further direct the said fiduciary to show cause why the petitioner or his estate should not be discharged from all future liability, if the court, after due notice to all parties interested, deem it reasonable and proper. If the court, on due consideration, shall discharge such surety or his estate, the fiduciary shall thereupon give a new bond, with surety or sureties, as the court shall order, and on failure or refusal so to do, within such time as is ordered by the court, shall be removed from the trust, and some other person or corporation appointed. When a new bond is required under the provisions of this clause the surety in the prior bond or his estate shall be liable for all breaches of the conditions thereof committed before the new bond is approved according to law.

NOTE.—This embodies the provisions of Sections 1, 2 and 3 of the Act of June 1, 1907, P. L. 384, 7 Purd. 7701-2. Section 4 of that act is a general repealer.

The word "fiduciary" has been substituted for "trustee, committee, guardian, assignee, receiver, executor, administrator, or other fiduciary;" the provisions as to representatives of a deceased surety have been inserted; the reference to the court of common pleas has been omitted; the jurisdiction is given to the orphans' court having jurisdiction of the accounts, instead of the court of the county of the residence of the fiduciary; "during any regular term of the court" has been omitted after "return thereof," and the phraseology has been modified.

The Act of 1907 seems to repeal by implication the Act of May 10, 1881, P. L. 14, 4 Purd. 4914, which applied only to trusts created "to continue for, or during, a life or lives, or marriage," and provided that the petition should not be presented until more than three years after the appointment of the trustee.

The Act of 1881 amended Section 1 of the Act of March 27, 1865, P. L. 44, and re-enacted Sections 2 and 3 of that act.

Section 1 of the Act of April 17, 1866, P. L. 111, 4 Purd. 4915, provided that the petition authorized by the Act of 1865 might, "in the event of the death of such sureties, or any one of them, be presented by the personal representative of such surety or sureties, with like effect in all respects, as if the petition had been presented by the deceased surety or sureties in his or her lifetime." This provision was omitted from the Acts of 1881 and 1907, but its equivalent is now included.

SECTION 55. In case any surety or sureties, or the personal representatives of any deceased surety or sureties upon the bond of any fiduciary, or any person interested in the trust, shall apply to the fiduciary for a complete and detailed statement of the nature and character of the securities in which the trust funds are invested, and the said fiduciary shall fail for the space of ten days to furnish such statement, or if, such statement having been furnished, it shall appear to the said surety or sureties, or the representatives of said surety or sureties, or other person interested in said trust, that the funds in the hands of the said fiduciary are badly invested so as to be likely to result in a loss to the trust, the said surety or sureties, or the representatives of said surety or sureties, or other person interested in the trust, may present a petition to the orphans' court having jurisdiction of said trust, praying that an order be made requiring the said fiduciary to file an account of the administration of his trust, which account shall include a complete and detailed statement of the manner and securities in which said trust funds are invested, within twenty days after service of said order, unless the time be enlarged by the court. Thereupon the

said court shall make such order, and if, upon the audit of such account, it shall appear to the court that the said fiduciary has been guilty of any act of fraud or mismanagement or has invested the trust funds in securities not authorized by law or by the will of the testator, or has made investments which are likely to cause a loss to the trust, said court may remove the said fiduciary and order payment of the assets to his successor or into court.

NOTE.—This is Section 1 of the Act of June 3, 1893, P. L. 273, 4 Purd. 4915, changed by inserting "personal" and "deceased" in line 2, by substituting "fiduciary" for "trustee, committee, guardian, assignee, receiver, administrator, executor or other person having trust funds in his hands," by requiring the filing and audit of an account instead of the filing of a statement in the first instance, and by eliminating the provisions as to investments outside of the state.

The Act of 1893 should be repealed only so far as it relates to fiduciaries who are within the scope of the present act. Section 2, 4 Purd. 4916, provides: "This act shall apply to all trusts, whether the same be within the jurisdiction of the orphans' court, of common pleas, or of a court of equity." Section 3 is a general repealer.

SECTION 56 (*a*) Whenever, by the provisions of any last will and testament admitted to probate, a trust has been or shall be declared of and concerning any real or personal estate, to be executed by a trustee or trustees named in said will or by the executor or executors of said will, whether by virtue of their office or otherwise, and any of the said executors or trustees shall die, renounce, resign, be dismissed from or refuse to act in the said trust, leaving the other executor or executors, trustee or trustees, continuing therein, it shall be lawful for the orphans' court having jurisdiction of the accounts of such executors or trustees, on the application of any party in interest, and with the consent of such continuing executor or executors, trustee or trustees, with notice to all persons interested, so far as such notice can reasonably be given, to appoint a trustee or trustees in the place of the executor or executors, trustee or trustees, so dying, renouncing,

resigning, dismissed or refusing to act, and to require the person or persons so appointed to enter sufficient security for the faithful performance of the trust. The trustee or trustees so appointed shall have the same power and interest over and in the property in trust, as the executor or executors, trustee or trustees, in whose stead he or they shall be so appointed as aforesaid. It shall also be lawful for the said court to appoint a successor or successors to such trustee or trustees from time to time, whenever from death, resignation or otherwise, the same shall be necessary or expedient.

NOTE.—This is derived from Section 2 of the Act of April 10, 1849, P. L. 597, 1 Purd. 1142 (which was confined to Philadelphia, but was extended throughout the state by the Act of April 23, 1864, P. L. 550, 1 Purd. 1143) and Section 1 of the Act of April 22, 1846, P. L. 483, 1 Purd. 1142.

(*b*) Whenever, in any of the cases enumerated in clause (*a*) of this section, all of the said executors or trustees shall die, renounce, resign, be dismissed from or refuse to act in the said trust, it shall be lawful for the orphans' court having jurisdiction of the accounts of such executors or trustees, on the application of any party interested, and with notice to all persons interested, so far as such notice can reasonably be given, to appoint a trustee or trustees in place of the executor or executors, trustee or trustees, so dying, renouncing, resigning, dismissed or refusing to act, and to require the person or persons so appointed to enter sufficient security for the faithful performance of the trust. The trustee or trustees so appointed shall have the same power and interest over and in the property in trust, as the executor or executors, trustee or trustees in whose stead he or they shall be so appointed as aforesaid. It shall also be lawful for the said court to appoint a successor or successors to such trustee or trustees from time to time, whenever from death, resignation or otherwise, the same shall be necessary or expedient.

NOTE.—This clause is intended to empower the court to make appointments in cases where there is an entire vacancy in the office of trustee. It follows the provisions of clause (*a*) so far as applicable.

(*c*) In all cases of trusts created by will, and annexed to the office of executor, such executor may decline to accept the trust, or be discharged therefrom, without affecting his office of executor, and the orphans' court of the proper county shall have power to fill the vacancy by appointment; and if a trust fund or estate is committed to an executor or other trustee, in which several cestuis que trust have or are entitled to enjoy a separate interest, and a vacancy should in any manner occur in the office of the trustee thereof, the said court may appoint one or more trustees of such estate or fund, for each of the said cestuis que trust, on his or her application; and the said trustee shall give security as in other cases.

NOTE.—This is Section 1 of the Act of March 13, 1859, P. L. 611, 1 Purd. 1143. The only change made is to substitute "in other cases" for "is provided by existing laws," at the end of the clause.

(*d*) The jurisdiction of proceedings under the provisions of this section shall be exclusively in the proper orphans' court: *Provided, however*, That nothing herein contained shall be construed to affect the jurisdiction of any court of common pleas in proceedings pending at the date of the approval of this act.

NOTE.—This clause is introduced to take away the concurrent jurisdiction of the common pleas to appoint substituted testamentary trustees. This involves the repeal of Sections 1 and 2 of the Act of April 14, 1828, P. L. 453, 4 Purd. 4894, Sections 18, and 23 to 26 of the Act of June 14, 1836, P. L. 634, 4 Purd. 4895—4900, and Section 5 of the Act of May 3, 1855, P. L. 416, 4 Purd. 4900, so far only as they relate to testamentary trustees. Sections 1 and 2 of the Act of March 22, 1825, P. L. 107, 4 Purd. 4894, conferring jurisdiction upon the supreme court, though doubtless obsolete since the Constitution of 1874, still appear in the Digests, and should be repealed by the present act so far as they relate to testamentary trustees.

SECTION 57 (*a*) Any fiduciary appointed by any orphans' court of this commonwealth, or by virtue of any last will and testament, probated within this commonwealth, may, if resident within this commonwealth, lawfully execute the duties of his trust, whether or not he is a resident of the county in which the trust was created, or in which the decedent had his domicile. The court having jurisdiction may, in its discretion, appoint or refuse to appoint as trustee or guardian any person who is not a resident of this commonwealth, or a corporation of any state of the United States of America, other than Pennsylvania, duly authorized by its charter or by law to act as such fiduciary, and shall require in all cases of a non-resident of this commonwealth, or of such corporation, a bond, with sufficient sureties, conditioned for the faithful discharge of the duties of the trust; but the court may, in its discretion, permit such corporation to give its own bond without sureties. Every appointment by will of a trustee or guardian who is a non-resident of this commonwealth shall be subject to the approval of such court and the court may require the entry of such bond. No such appointment shall be made of, nor shall letters testamentary be issued to, a corporation of another state, unless such corporation shall first file with the clerk of said court or with the register of wills, as the case may be, an appointment in writing of an attorney-in-fact, resident within the respective county, upon whom service of process and notices may be made.

NOTE.—This is Section 1 of the Act of May 17, 1871, P. L. 269, 4 Purd. 4923, confined to fiduciaries who are within the scope of the new act, altered in phraseology and extended to testamentary guardians and to corporations of other states. The clause as now worded is believed to express the meaning of the ambiguous language of the Act of 1871. See Plummer's Estate, 24 Dist. Rep. 542. The last sentence is new.

(*b*) When the trustee or trustees of any estate shall reside out of this commonwealth, and any part of the trust estate, property or fund is situated within this

state, the proper orphans' court may, on the petition of any of the parties interested in said trust property, appoint one or more trustees resident within this commonwealth, to act in conjunction with said non-resident trustee or trustees in the management and disposition of said trust; and the said court shall have the same power over said trustee or trustees so appointed that it has in other cases of trust.

NOTE.—This is Section 2 of the Act of March 17, 1838, P. L. 81, 4 Purd. 4900, with slight changes of phraseology. That section is recommended for repeal so far as it relates to trustees concerned with decedent's estates.

SECTION 58 (*a*) Except as hereinafter provided, no letters testamentary or of administration, or otherwise, which may be granted out of this commonwealth, purporting to authorize any person to intermeddle with the estate of a decedent, shall confer upon such person any of the powers and authorities possessed by an executor or administrator under letters granted within this state; nor, except as hereinafter provided, shall any appointment of a trustee of a decedent's estate or any part thereof by will probated out of this commonwealth, or by any court out of this commonwealth, confer upon such person any of the powers and authorities possessed by a trustee under a will probated within this state or appointed by an orphans' court of this state.

NOTE.—This is founded on part of Section 6 of the Act of March 15, 1832, 1 Purd. 1074. The provision was new in that act, the Commissioners remarking: "The practice of recognizing foreign letters of administration is believed to be almost peculiar to this state. It originated in the Act of 1705. We propose an alteration of the law in this respect. In the case of M'Cullough *vs.* Young (1 Binney 63; and see 1 Dall. 457), the court admit that much inconvenience may arise from this provision of our law, and suggest that it may be a fit subject for legislative interposition. We have introduced the last of these provisions in consequence of this suggestion and with entire conviction of its propriety."

The changes now made are to insert the words "except as hereinafter provided," so as to except the cases covered by the subsequent clauses of this section, to transpose the clause beginning "which may be granted," so that it stands after "otherwise" instead of after "decedent," and to add the provision as to trustees.

(*b*) Except as hereinafter provided, no appointment of a guardian, made or granted by any authority out of this state, shall authorize the person so appointed to interfere with the estate, or control the person of a minor in this state: *Provided*, That such foreign guardian may, at the discretion of the orphans' court having jurisdiction, be appointed by said court, on giving security for the due performance of his trust.

NOTE.—This is Section 7 of the Act of March 29, 1832, 1 Purd. 1085, which was new in that act, changed by inserting the first four words and by modifying the wording of the proviso.

(*c*) It shall be lawful for any executor, administrator, trustee, or other person duly authorized to take charge or possession of the personal estate of any decedent, or for any guardian or other legal representative of the estate of a minor, acting under letters testamentary or of administration, or other authority, granted by or under the laws of any other state, territory or possession of the United States of America, or of any foreign country, to assign and transfer, and to receive the dividends or interest of, any public debt or loan of the Commonwealth of Pennsylvania, or of any county, city, borough, township or school district thereof, or any stocks or bonds of any corporation incorporated under the laws of this commonwealth, standing in the name of, or belonging to, the decedent, minor or cestui que trust, or any mortgage debt or indenture of mortgage held by, or belonging to, the decedent, minor or cestui que trust, upon real estate situate within this commonwealth, and to enter or cause to be entered satisfaction upon the record of such indenture of mortgage. Before any such act shall be done by any such executor, administrator, trustee,

guardian or other person, there shall be filed in the office of the register of wills for the county in which is located the office for the transfer of such loans, stocks or bonds, or, in the case of a mortgage, of the county where the mortgaged real estate may be situated, when such person is acting under letters or other authority granted by or under the laws of any other state, territory or possession of the United States of America, a copy of the will, probate and letters issued thereon, or of such other grant of authority, duly authenticated in accordance with the Acts of Congress; or, when such person is acting under letters or other authority granted by or under the laws of any foreign country, a copy of such will, probate and letters issued thereon, or of such other grant of authority, certified by the official custodian of such documents or records, under his official seal if any, to be a true and correct copy of the originals thereof in his possession or under his control, together with the certificate of the presiding judge or the officer having jurisdiction or authority over such custodian that the attestation is in due form and by the proper officer: *Provided*, That before any such executor, administrator or trustee shall assign or transfer any such loans, stocks, bonds or mortgages, or receive any interest or dividends thereon, or enter satisfaction of any such mortgage, he shall also file, with said register of wills, an affidavit stating that the said decedent is not indebted to any person in this commonwealth, and that the proposed transfer, assignment, receipt or entry of satisfaction is not made for the purpose of removing any of the assets of said decedent beyond the reach of any of the creditors in this commonwealth; and any such transfer, assignment, receipt or entry of satisfaction without first making and filing such affidavit, shall be void.

NOTE.—This is Section 1 of the Act of April 8, 1872, P. L. 44, 1 Purd. 1103, as amended by the Act of June 13, 1911, P. L. 890, 5 Purd. 5890, further amended so as to include the provisions of Section 3 of the Act of April 14, 1835, P. L. 275, 1 Purd. 1101; Section 5 of the Act of March 12, 1842, P. L. 67, 1 Purd. 1101; Section 3 of the

Act of June 16, 1836, P. L. 683, 1 Purd. 1102; Section 8 of the Act of May 15, 1850, P. L. 767, 1 Purd. 1102; and Section 1 of the Act of May 15, 1874, P. L. 195, 1 Purd. 1102.

The sections of the Acts of 1835 and 1842, above referred to, were held to be confined to executors and administrators appointed in one of the United States: Alfonso's Executors' Appeal, 70 Pa. 347. The Acts of 1872 and 1874 included foreign countries, but covered only the transfer of loans of the state and the city of Philadelphia, and stock and registered loans of Pennsylvania corporations, and not other municipal loans.

Some changes in phraseology have also been made in the Act of 1872 for the purposes of clearness and brevity.

(*d*) Whenever a citizen of the United States, nonresident in the commonwealth of Pennsylvania, shall have died owning real estate in this commonwealth, and by his last will and testament shall have empowered his executor or trustee to sell and convey his real estate, it shall be lawful for said executor or trustee, or his duly appointed successor, although not a resident in this commonwealth, from and after the expiration of one year from the death of such decedent, to execute any power of sale contained in said last will and testament, and to sell and convey to the purchaser the whole or any part of such real estate located in this commonwealth: *Provided*, That before executing the power of sale, a copy of the last will, probate and letters testamentary, and of the decree appointing such successor, if any there be, duly authenticated as provided in clause (*c*) of this section, shall be filed in the office of the register of wills of the county where the land is situated: *Provided further*, That nothing in this clause shall change or modify the acts of assembly relating to collateral inheritances.

NOTE.—This is Section 1 of the Act of June 23, 1897, P. L. 200, 1 Purd. 1103, except that the period is reduced from five years to one year to correspond to the reduction of the period of lien of decedents' debts; in the first proviso, "duly authenticated copy" is used instead of "certified copy;" in the second proviso "clause" is

substituted for "act;" and the provisions as to the "duly appointed successor" have been inserted: See Hoysradt *vs.* Gas Co., 194 Pa. 251.

The Act of May 20, 1891, P. L. 98, Section 1, 1 Purd. 1103, provided that conveyances theretofore made under the authority of wills proved as prescribed by the laws of the state of which the testator was a citizen should, upon the recording of a duly certified copy of the will in the office of the register of the county where the lands lay, have the same force and effect as if the will had been duly proved in Pennsylvania. The Act of 1891 was substantially the same as the Acts of May 28, 1885, P. L. 24, Section 1, and May 22, 1878, P. L. 98, Section 1. The validating Act of April 2, 1915, P. L. 43, 6 Purd. 7288, is in similar terms. These validating acts are not suggested for repeal.

(*e*) It shall be lawful for foreign executors or administrators to cause to be issued, in their names as such executors or administrators, writs of scire facias within this commonwealth, on all judgments in favor of their decedents, the lien of which judgments is about expiring: *Provided*, That before any further proceedings are had, letters testamentary or of administration must be granted within this commonwealth, as provided by law.

NOTE.—This is Section 1 of the Act of June 27, 1883, P. L. 163, 1 Purd. 1101, with slight verbal changes.

(*f*) It shall be lawful for the orphans' court having jurisdiction of the accounts of any fiduciary to award personal property to the foreign executor or administrator of a deceased non-resident creditor, legatee or distributee, when it shall appear to the satisfaction of the court, by affidavit or other evidence, that there are no creditors of such non-resident decedent within this commonwealth, and when it shall further appear by certificate of the register of wills, surrogate or court of the proper jurisdiction, duly authenticated as required by the Acts of Congress, if the domicile of such non-resident creditor, legatee or distributee was in another state, territory or possession of the United States of America, or by the proper diplomatic or con-

sular officer appointed by the United States of America, under his official seal, if such domicile was in a foreign country, that the person claiming to receive such award is authorized under the laws of such state, territory, possession or country to receive the property of his decedent: *Provided*, That the benefits of this clause shall not extend to any case in which it shall appear that the rights of any resident of this commonwealth may be adversely affected by such transfer of property to such foreign executor or administrator.

NOTE.—This is a new clause, copied, with a few changes in language, and with the insertion of the words "to the satisfaction of the court," and "or other evidence," in lines 5 and 6, from House Bill No. 248 of the session of 1915, which, the Commissioners are advised, was vetoed.

The Commissioners are of opinion that this clause will eliminate a hardship that frequently arises in the settlement of estates where a distributee domiciled in another state or foreign country is entitled to an award. As the law now stands, the foreign executor or administrator cannot be recognized by the court in awarding distribution; and the appointment of an ancillary executor or administrator is required to be made, although the distributee may never have resided or done business in this commonwealth, and there is not the slightest probability of the existence of any debts due to our citizens. This involves delay and expense, the entry of security in the office of the register of wills, with the further costs of filing and adjudication of an account before the bond can be released. The Commissioners believe that the rights of residents of our own commonwealth are sufficiently safeguarded in this clause, and therefore, in spite of the veto above mentioned, respectfully recommend its adoption.

(*g*) 1. In all cases where any guardian and his ward, or trustee and his cestui que trust, or committee and his lunatic, or any other fiduciary and the person in whose interest he is acting, shall both be non-residents of this state, and such ward or cestui que trust shall be entitled to money, personal property of any description or the proceeds of any sale of real estate in this state, under the control or jurisdiction of any orphans' court, and such

guardian, trustee or other fiduciary shall produce satisfactory proof to said court, by certificates, that he has given bond and security, with special reference to the money or personal property to be removed, in the state or country in which he and his ward or cestui que trust reside, in double the amount of such money or of the value of such property, as guardian, trustee or other fiduciary, and it shall be found that a removal of the property will not conflict with the terms or limitations attending the right by which the ward or cestui que trust owns the same, and that no right of any resident of this commonwealth will be prejudiced by such removal, then any such guardian, trustee or other fiduciary may demand or sue for and remove any such money or property to the place of residence of himself and his ward or cestui que trust. If such guardian, trustee or other fiduciary and his ward or cestui que trust reside in another state, territory or possession of the United States of America, such certificate shall be authenticated as required by the Acts of Congress, and, if they reside in a foreign country, shall be made by the court having jurisdiction of such guardian, trustee or other fiduciary, and authenticated by and under the official seal of a diplomatic or consular officer appointed by the United States of America and residing in such country: *Provided*, That if it shall appear by such certificate that, under the laws of such state, territory, possession or foreign country, such guardian, trustee or other fiduciary, is not required to enter security, but that the interests of his ward or cestui que trust are safeguarded by a deposit of the money or property in the court having proper jurisdiction, then it shall be lawful for the orphans' court of the proper county in this state to cause suitable orders to be made authorizing the delivering and passing over of such money or property to such court without the entry of security.

NOTE.—This is Section 1 of the Act of May 13, 1889, P. L. 190, 1 Purd. 1085, which amended Section 1 of the Act of April 21, 1856, P. L. 495, now further amended by adding the proviso, which seems to belong in this

section rather than in the next one, by including committees ofl unatics and other fiduciaries, and by making other changes as in House Bill No. 247 of the session of 1915, which bill the commissioners are advised was vetoed.

Those changes were to extend the act to residents of foreign countries, thus supplying an hiatus in the law, and to provide that the bond must have been given "with special reference to the property to be removed."

In the present draft, the condition has also been added that "no rights of any resident of this commonwealth will be prejudiced by such removal."

The Act of 1889, as amended, seems to cover all matters included in Section 2 of the Act of April 13, 1840, P. L. 319, 1 Purd. 1088, and Section 1 of the Act of May 25, 1871, P. L. 279, 1 Purd. 1086, which are therefore recommended for repeal.

2. When such non-resident guardian or trustee shall produce an exemplification under the seal of the office, if there be a seal, of the proper court in the state or country of his residence, containing all the entries on record in relation to his appointment and giving bond, and authenticated as required by the Acts of Congress, or by a diplomatic or consular officer appointed by the United States of America, as provided in paragraph 1 of this clause, the orphans' court of the proper county in this state may cause suitable orders to be made, discharging any resident fiduciary and authorizing the delivering and passing over of such personal property, and also requiring receipts to be passed and filed, if deemed advisable: *Provided*, That in all cases thirty days' notice shall be given to the resident fiduciary, if such there be, of the intended application for the order of removal; and the court may reject the application and refuse such order whenever it is satisfied that it is for the interest of the ward or cestui que trust that such removal shall not take place, or that the claims of residents of this commonwealth are not fully protected.

NOTE.—This is Section 2 of the Act of May 13, 1889, P. L. 190, 1 Purd. 1085, which amended Section 2 of the Act of April 21, 1856, P. L. 495, further amended sub-

stantially as in House Bill No. 247 of the session of 1915, except that the first proviso, added by said bill, has been transferred to the preceding paragraph, the word "filed" has been substituted for "recorded" as to receipts, and the proviso that the benefits of the act shall not extend to the citizens of a state or country in which a similar law does not exist has been omitted.

The changes made by said bill were to include residents of foreign countries, and to insert in the proviso the words "if such there be." In the next to the last line, "residents of" has been substituted for "creditors in."

The Commissioners are advised that House Bill No. 247 was not approved by the Governor. Notwithstanding such veto, however, the Commissioners, with due deference, beg leave to recommend the passage of this and the last preceding clause.

(*h*) When all the persons for whose benefit a valid trust shall have been created by will, for a term of years or for life, shall have removed from this state into any other state, territory or possession of the United States, to reside permanently therein, the orphans' court having jurisdiction of such trust is hereby authorized and empowered, on application by or on behalf of all the persons interested in the trust, to direct the trustee or trustees appointed in and by said will, to pay over said trust moneys, or transfer the securities in which they may have been invested, to a trustee or trustees duly appointed by the court of such other state, territory or possession, upon the production to said court of satisfactory proof, by certificates, of the appointment of such trustee or trustees in the other state, territory or possession, the authority of such trustee or trustees to receive such moneys or securities, and the entry of bond and security or proof of the fact that under the laws of such state, territory or possession security is not required, such certificates to be authenticated in the manner provided in clause (*g*), paragraph 1 of this section, and upon the production of satisfactory proof that the removal of the property will not conflict with the terms or limitations attending the rights which the cestuis que trust have in such money or securities.

NOTE.—This is founded on Section 1 of the Act of May 8, 1889, P. L. 123, 4 Purd. 4886, which includes trusts created by deed as well as by will, and should be repealed only so far as it relates to the latter.

In the sixth line, "jurisdiction" has been substituted for "cognizance." and in the fourth line and subsequently the words "or possession" have been added after "territory." Instead of the proviso in the Act of May 8, 1889, provisions have been inserted, beginning on the thirteenth line, conforming to those of the preceding sections founded on the Act of May 13, 1889, P. L. 190.

Section 1 of the Act of March 31, 1905, P. L. 91, 5 Purd. 5890, provides: "Executors and administrators, in this commonwealth, shall not be required to deliver to any foreign executor or administrator any fund which has been devised or bequeathed, in whole or in part, by the will of the decedent, valid under the laws of this commonwealth and duly probated at the domicile of such decedent, where any person claiming such fund, or any part thereof, is or shall be a citizen of this commonwealth; but such fund shall be distributed, under the direction of the orphans' court of the proper county, to legatees, devisees and creditors, according to the terms of said will and the laws of this commonwealth." Section 2 is merely a repealer.

The purpose of this act is not clear. If it means that the court in this state shall distribute to resident legatees and creditors, it seems unnecessary. If it means that, because there is one legatee or creditor residing in Pennsylvania, the court here shall distribute the entire estate, it is certainly undesirable. For a discussion of the Act of 1905, see Bertin's Estate, 245 Pa. 256.

It is recommended that the Act of 1905 be repealed.

SECTION 59 (*a*) The orphans' court of each county shall have the care of the persons of minors resident within said county, and of their estates, and shall have power to admit such minors, over the age of fourteen, when and as often as there shall be occasion, to make choice of guardians, and to appoint guardians for such as are under the age of fourteen or otherwise incompetent to make choice for themselves. Such appointment or admission of a guardian by the orphans' court of the county in which

the minor resides, shall have the like effect in every other county in this commonwealth, as in that by the orphans' court of which he shall have been so admitted or appointed.

NOTE.—This is Section 5 of the Act of March 29, 1832, 1 Purd. 1083, altered by inserting in the fourth line the words "over the age of fourteen," by substituting in lines 6 and 7, the words "are under the age of fourteen" for "they shall judge too young," and by omitting the first part of the proviso, which is covered by clause (*b*).

Section 5 of the Act of 1832 was derived from Sections 7 and 12 of the Act of March 27, 1713, 1 Sm. L. 81. The Act of 1832 confined the jurisdiction to minors resident within the county, and omitted that part of Section 7 of the Act of 1713 which empowered the court "to order and direct the binding or putting out of minors apprentices to trades, husbandry or other employment."

(*b*) Persons of the same religious persuasion as the parents of the minors shall, in all cases, be preferred by the court, in their appointment as guardians of the persons of such minors.

NOTE.—This is founded on the first part of the proviso to Section 5 of the Act of March 29, 1832, 1 Purd. 1083.

(*c*) No executor, administrator or trustee shall be admitted or appointed, by the orphans' court, guardian of a minor having an interest in the estate under the care of such fiduciary: *Provided*, That nothing herein contained shall be construed to extend to the case of a testamentary guardian.

NOTE.—This is Section 6 of the Act of March 29, 1832, 1 Purd. 1084, which was new in that act. The only change is to add "or trustee."

(*d*) The orphans' court shall not appoint the father or the mother of a minor as guardian of the estate of said minor: *Provided*, That nothing herein contained shall be construed to extend to the case of a testamentary guardian: *And provided further*, That where the estate

of the minor shall be of the value of one hundred dollars or less, the court may, in its discretion, authorize payment or delivery thereof to the natural guardian of the minor or the person by whom the minor is maintained, without the appointment of a guardian by the court or the entry of security.

NOTE.—This is a new section, framed in part in accordance with the existing practice in many counties. The Commissioners regard it as always inadvisable and frequently dangerous to appoint the parent of a minor to be the guardian of its estate. Parents are too often tempted to regard the estate as virtually their own and use it for purposes which could not be approved by the court; or even when actuated by proper motives will not keep the accurate accounts of the estate which the minor on coming of age is entitled to receive. The consequence may be either an unfortunate and distressing litigation, or perhaps the condonation of an injustice.

When the amount is very small, it seems unnecessary to subject the fund to the expense of a guardianship.

(*e*) The orphans' court of each county shall have power to appoint guardians of the estates of minors residing out of the commonwealth, in all cases where such minors are possessed of estates lying within the jurisdiction of said court, upon the petition of the minors, if over the age of fourteen, and if it be reasonably practicable for such minors to present their own petitions, and in other cases on the petitions of persons qualified to act as their next friends, without requiring the said minors to appear in court to make choice of such guardians.

NOTE.—This is Section 44 of the Act of April 25, 1850, P. L. 576, 1 Purd. 1084, altered by substituting the words beginning "if over the age of fourteen" and ending "next friends" for "or any of their relatives or friends or any person interested in such estates."

(*f*) The orphans' court of each county shall have power to appoint guardians of the persons and estates of minors, residents of such county, who may be absent in the service

of the United States or who may be physically unable to appear and choose for themselves, or who may be so distant from the seat of justice of the county as to make it unnecessarily expensive for them to appear, upon the petition of the minors, if over the age of fourteen, and if it be reasonably practicable for such minors to present their own petitions, and in other cases on the petitions of persons qualified to act as their next friends, without requiring the said minors to appear in court to make choice of such guardians: *Provided*, That when the appointment shall be made on petition of a next friend, the minor, if of the age of fourteen or on attaining that age, may subsequently appear and choose his guardian.

NOTE.—This is Section 1 of the Act of August 25, 1864, P. L. 1029, 1 Purd. 1085, altered so as to conform to the provisions of the last preceding clause, and by inserting, in the third line, "residents of such county."

(*g*) The orphans' court having jurisdiction, whenever they may deem it proper, may require a bond, with good and sufficient corporate security, or with two good and sufficient individual sureties, from every guardian of a minor, whether admitted or appointed by the court, or appointed by will, or, in the case of a corporation duly authorized by its charter or by law to act as guardian, said court may permit such corporation to give its own bond without surety. Guardians' bonds shall be filed in the office of the clerk of the court, and be considered in trust for all persons interested; the bonds shall be taken to the commonwealth in such penalties as the court shall direct and the condition shall be in the following form:

The condition of this obligation is such, that if the above-bounden A. B., guardian of C. D., a minor child of E. F., (late of , deceased,) shall, at least once in every three years, and at any other time when required by the orphans' court for the county of , render a just and true account of the management of the property and estate

of the said minor, under his care, and shall also deliver up the said property, agreeably to the order and decree of the said court, or the directions of law, and shall, in all respects, faithfully perform the duties of guardian of the said C. D., then the above obligation shall be void, otherwise it shall be and remain in full force and virtue.

Provided, That nothing in this act contained shall be construed to deprive a minor of any action or remedy to which he may be entitled at the common law, against his guardian for any cause whatever.

NOTE.—This is Section 8 of the Act of March 29, 1832, 1 Purd. 1086, altered by substituting new provisions as to the sureties in place of the old phrase "with good and sufficient security."

Section 8 of the Act of 1832 was founded on Section 1 of the Act of March 30, 1821, P. L. 153.

It is noted in Purdon that in Perry County the bonds are required by the Act of March 27, 1869, P. L. 488, to be recorded, and such record is evidence.

(*h*) Every guardian shall, within thirty days after any property of his ward shall have come into his hands or possession, or into the hands and possession of any person for him, file in the office of the clerk of the court a just and true inventory and statement, on oath or affirmation, of all such property or estate.

NOTE.—This is Section 9 of the Act of 1832, 1 Purd. 1086, which was new in that act. The word "such" is omitted before "guardian" in the first line.

(*i*) When any one shall die, leaving an infant child or children, without having made an adequate provision for the support and education of such child or children, during their minority, the orphans' court may direct a suitable periodical allowance, out of the minor's estate, for the support and education of such minor, according to the circumstances of each case; which order may, from time to time, be varied by the court, according to the age of the minor and the circumstances of the case.

NOTE.—This is Section 13 of the Act of 1832, 1 Purd. 1088, which was new in that act.

(*j*) 1. Every guardian, whether required by the court to give security or not, shall, at least once in every three years, and at any other time when so required by the court, render an account of the management of the minor's property under his care, which accounts shall be filed in the office of the clerk of the orphans' court, for the information of the court and the inspection of all parties concerned.

2. After the filing of such account or accounts, such guardian, or any person qualified to act as next friend of the minor, may petition the orphans' court of the respective county for leave to have said account or accounts examined or audited and confirmed, with the same force and effect as executors', administrators' and trustees' accounts are examined or audited and confirmed.

3. Such petition shall set forth the reason why such account or accounts should be examined or audited and confirmed, and shall contain full information as to who may be next of kin or nearest relative of age to such minor or minors, and all others interested in the minor's estate, together with their addresses if it is possible to give them.

4. The court may thereupon direct to whom, and what, notice, if any, shall be given to such next of kin, or nearest relative of age, or the parties interested in said minor's estate, including the minor or minors if fourteen years of age or over, of the filing of said account or accounts and presentation of said petition.

5. After the filing of due proof of the service of said notice, if any be required by the court, the court may, if it be satisfied that any reasonable necessity exists for the examination or audit and confirmation of such account or accounts, asked by said petition, thereupon appoint some suitable person to act as guardian ad litem for the minor or minors interested in said account or accounts; and the same shall be thoroughly examined by said guardian ad litem, who shall make report to the court of the

result of his examination; or the court may examine and audit said account itself; and, after said examination or audit is completed, a final decree of confirmation as to the matters contained in said account or accounts, and said report or reports, and said audit or audits, shall be made by the court, which decree of confirmation shall be final and conclusive as to matters contained in said accounts, reports or audits and decrees, with the same force and effect as such decrees now have in respect to the accounts of executors, administrators and trustees and the audits thereof.

6. The costs of said audits or examinations, including a fee for said guardian ad litem to be fixed by the court, shall be allowed as part of the administration expenses, and be paid by such guardians out of the property of the ward in their hands, and allowed as credits in said decrees or the said costs shall, in the discretion of the court, be paid by the said guardians personally.

7. Appeals from such decrees, and rehearings of such accounts shall be allowed, in the same manner and form, and with the same force and effect, as are allowed in the similar cases of other fiduciaries.

8. Every such guardian, unless previously discharged or removed, shall, on the arrival of his ward at full age, file in the register's office a full and complete account of his management of the minor's property under his care, including all the matters embraced in each partial account, except where an examination or audit, and final decree of confirmation, has taken place, as hereinbefore provided, in which case said final account shall include only such matters as were not included in such former accounts and decrees aforesaid. And the decree of the orphans' court upon such final account shall, like other decrees of the court, be conclusive upon all parties, unless reversed, modified or altered on appeal.

NOTE.—This is Section 10 of the Act of 1832, 1 Purd. 1086, as amended by the Act of June 9, 1911, P. L. 744, 5 Purd. 5887, now divided into numbered paragraphs because of its excessive length. The first paragraph was

copied from the first clause of Section 3 of the Act of March 30, 1821, P. L. 153. The last was new in the Act of 1832. The others were added by the amendment of 1911.

The only changes now made are to strike out the word "such," before "guardian" in the first line of paragraph 1, so as to make the clause apply to testamentary as well as statutory guardians, to substitute the word "file" for "settle," "partial account" for "partial settlement," "final account" for "final accounts," in the last paragraph; and "rehearings of such accounts" for "rehearings of such decrees," and "similar cases of other fiduciaries," for "cases of decrees made in executors', administrators', and trustees' accounts," in paragraph 7. In paragraph 6, the words beginning "or the said costs," are new.

(*k*) In all cases in which proceedings may be had in any orphans' court, affecting the interest of a minor, notice of such proceedings shall be given to the guardian of such minor in the same manner as is provided by law in the case of persons of full age. If such minor has no guardian appointed by an orphans' court of this commonwealth, or by will probated within this commonwealth, the orphans' court in which such proceedings shall be pending shall appoint a guardian ad litem for such minor in the same manner as is provided by this act in the case of ordinary applications for the appointment of guardians. If such minor or his next friend shall fail or refuse to apply for the appointment of a guardian ad litem, as aforesaid, then such guardian shall be appointed by said court on petition filed by any person interested in such proceedings. Notice shall be served, as aforesaid, upon such guardian ad litem whenever notice shall be requisite.

NOTE.—This is founded on Section 53 of the Act of March 29, 1832, 3 Purd. 3372, which was new in that act.

After "minor" in the fourth line, the following words are omitted: "if such guardian be resident within the county, or within forty miles of the seat of justice of the county," and in the fifth line, the word "resident" is omitted before "persons." After "will" in the seventh line, the

words "probated within this commonwealth" have been added.

The subsequent part of the section has been remodeled so as to conform to the provisions for appointment of guardians in general, with a method for appointment in case the minor and his next friend fail to act.

SECTION 60 (*a*) Whenever it shall be made known to the orphans' court of the county in which shall be found all or the greater portion of the estate, within this commonwealth, of any person who has been a resident either of this commonwealth or of any other state, territory, or possession of the United States, or of any foreign country, and who has absented himself from his usual place of abode, by the petition, verified by affidavit, of the husband, wife or next of kin of such person, or other persons interested, in the order named, such petition being supported by the affidavits of at least two disinterested residents of the city, borough, township, or other territorial subdivision where such person was last known to reside, that such person has been absent from his usual place of abode for the space of one year, that his whereabouts is not and has not been known for the space of one year, and he has left an estate, either real or personal, or both, situated, owing or belonging to him, within this commonwealth without any person to take charge of or manage the same, it shall be lawful for said court to appoint one or more trustees who shall take charge of and manage the estate of such person, so being absent, and who shall be under the control and direction of said court.

NOTE.—This is Section 1 of the Act of April 11, 1879, P. L. 21, 4 Purd. 4904, as amended by the Act of March 30, 1905, P. L. 77, 7 Purd. 7702, altered so as to combine with it the provisions of Sections 2 and 3 of the Act of 1905, so as to provide for the affidavits of two disinterested residents in all cases and to substitute "city" for "ward," and so as to omit the proviso.

(*b*) Such trustee or trustees, before taking charge of such estate, shall give bond in twice the amount of the

personal property, and seven years' rental of real estate, with sufficient corporate security or two sufficient individual sureties, to be approved by said court, for the faithful discharge of his or their duties, and shall, within thirty days after his or their appointment, file an inventory of said estate, and render an account at least once in three years, or oftener if required by said court; *Provided*, That in the case of a corporation duly authorized by its charter or by law to act as such trustee, said court may permit such corporation to give its own bond without surety.

NOTE.—This is Section 2 of the Act of April 11, 1879, P. L. 21, 4 Purd. 4904, with the insertion of the words "trustee or" in the first line, of the provisions as to corporate or individual sureties and of the proviso.

(*c*) If such person so being absent shall return before the expiration of seven years from the time when he was last heard of, or before letters testamentary or of administration shall have been issued in his estate on the ground of his presumed death, or, in case such letters shall have been so issued, before the said trustee or trustees shall have paid or delivered over the property or estate to the executors or administrators so appointed, then said trustee or trustees shall render an account and restore to such person the property and estate after deducting the reasonable expenses of said trust and compensation of said trustee or trustees. If such absent person shall die within such period of seven years, and letters testamentary or of administration shall be duly issued in his estate, or if, after the expiration of said period of seven years, letters testamentary or of administration shall be issued in his estate on the ground of his presumed death, then said trustee or trustees shall render an account and pay and deliver over to the executors or administrators of such person the property and estate after deducting expenses and compensation as aforesaid.

NOTE.—This is founded upon Section 3 of the Act of April 11, 1879, P. L. 21, 4 Purd. 4904, which has been redrafted in order to avoid conflict with the provisions of the new act as to presumed decedents.

Section 4 of the Act of April 11, 1879, P. L. 21, 4 Purd. 4905, validating previous cases, seems to serve no purpose now, and should be repealed.

SECTION 61. No immaterial variation from the forms given and prescribed in and by this act, shall vitiate or render void any proceedings in which said forms shall be used.

NOTE.—This is Section 43 of the Act of March 15, 1832, 1 Purd. 1072.

SECTION 62. This act shall be known and may be cited as the Fiduciaries Act of 1917.

SECTION 63. The following acts and parts of acts of assembly are hereby repealed as respectively indicated. The repeal of the first section of an act shall not repeal the enacting clause.

An act entitled "An Act directing the order of payment of debts of persons deceased," passed January 12, 1705–6, 2 Statutes at Large, 198, Chapter 134, absolutely.

Sections 2 to 7 inclusive, and 10 to 13 inclusive, of an act entitled "An Act for establishing orphans' courts," passed March 27, 1713, 1 Sm. L. 81, absolutely.

An act entitled "An Act for the more easy recovery of legacies," passed March 21, 1772, 1 Sm. L. 383, absolutely.

Section 5 of an act entitled "An Act for prevention of frauds and perjuries," passed March 21, 1772, 1 Sm. L. 389, absolutely.

An act entitled "An Act for continuing an act, entitled An Act for the more easy recovery of legacies," passed October 9, 1779, 1 Sm. L. 473, absolutely.

Section 8 of an act entitled "An Act to establish the judicial courts of this commonwealth, in conformity

to the alterations and amendments in the constitution," passed April 13, 1791, 3 Sm. L. 28, absolutely.

An act entitled "An Act to enable executors and administrators, by leave of court, to convey lands and tenements contracted for with their decedents, and for other purposes therein mentioned," passed March 31, 1792, 3 Sm. L. 66, absolutely.

Sections 1, 2, and 14 to 21 inclusive of an act entitled "An Act directing the descent of intestates' real estates, and distribution of their personal estates, and for other purposes therein mentioned," passed April 19, 1794, 3 Sm. L. 143, absolutely.

Sections 1 to 4 inclusive, and 9, of an act entitled "An Act supplementary to the act, entitled 'An Act directing the descent of intestates real estates, and distribution of their personal estates, and for other purposes therein mentioned,'" passed April 4, 1797, 3 Sm. L. 296, absolutely.

An act entitled "An Act declaring the power and authority given by any last will and testament to executors to sell and convey real estates, to be and remain in the survivors or survivor of them, unless otherwise expressed in the will of the testator, and for other purposes therein mentioned," passed March 12, 1800, 3 Sm. L. 433, absolutely.

An act entitled "An Act authorizing executors and administrators, in certain cases, to convey lands sold by their decedents by order of orphans' court," approved April 2, 1802, P. L. 133, absolutely.

An act entitled "A supplement to the act entitled, 'An Act to enable executors and administrators, by leave of court, to convey lands and tenements contracted for with their decedents, and for other purposes therein mentioned,'" approved March 12, 1804, P. L. 271, absolutely.

Section 3 of an act entitled "An Act to amend certain parts of an act, entitled 'An Act supplementary to the several acts of this commonwealth, concerning partitions and for other purposes therein mentioned,'" approved March 26, 1808, P. L. 144, absolutely.

Section 2 of an act entitled "An Act relative to dower, and for other purposes," approved April 1, 1811, P. L. 198, absolutely.

An act entitled "A supplement to the act entitled, 'An Act declaring the power and authority given by any last will and testament to executors to sell and convey real estates, to be and remain in the survivors or survivor of them, unless otherwise expressed in the will of the testator, and for other purposes therein mentioned,'" approved February 7, 1814, P. L. 44, absolutely.

An act entitled, "An Act to compel trustees to account in certain cases, and for other purposes," approved February 17, 1818, P. L. 104, in so far as it relates to testamentary trustees.

An Act entitled, "A further supplement to the act entitled 'An Act to enable executors and administrators by leave of the court to convey lands and tenements contracted for with their decedents, and for other purposes,'" approved March 10, 1818, P. L. 183, absolutely.

Section 7 of an act entitled, "An Act to compel assignees to settle their accounts, and for other purposes," approved March 24, 1818, P. L. 285, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

Section 2 of an act entitled "An Act to limit the time of appeal in cases of divorce, and of the settlement of the accounts of guardians, executors and administrators," approved February 8, 1819, P. L. 58, absolutely.

Section 2 of an act entitled "A further supplement to an act, entitled 'An Act to enable the executors and administrators by leave of court, to convey lands and tenements contracted for with their decedents, and for other purposes therein mentioned,' passed the thirty-first of March, one thousand seven hundred and ninety-two," approved February 5, 1821, P. L. 25, absolutely.

An act entitled "An Act relative to guardians of minor children," approved March 30, 1821, P. L. 153, absolutely.

Section 2 of an act entitled, "An Act to encourage domestic industry, and promote the comfort of the poor," approved March 31, 1821, P. L. 178, absolutely.

An act entitled "A further supplement to the act entitled, 'An Act directing the descent of intestates, real estates and distribution of their personal estates, and for other purposes therein mentioned,'" approved April 1, 1823, P. L. 286, absolutely.

Section 1 of an act entitled "An Act to enable executors, administrators, guardians, and other trustees, to invest their trust moneys," approved February 18, 1824, P. L. 25, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act to prevent the failure of trusts," approved March 22, 1825, P. L. 107, in so far as it relates to testamentary trustees.

Section 1 of an act entitled "A supplement to the intestate law of this commonwealth," approved April 8, 1826, P. L. 255, absolutely.

Section 3 of an act entitled "An Act for the relief of the poor," approved April 10, 1828, P. L. 285, absolutely.

Sections 1 and 2 of an act entitled "An Act to prevent the failure of trusts, to provide for the settlement of accounts of trustees and for other purposes," approved April 14, 1828, P. L. 453, in so far as they relate to testamentary trustees.

Sections 1 and 2 of an act entitled "An Act concerning executors," approved April 3, 1829, P. L. 122, absolutely.

An act entitled "A further supplement to the act directing the descent of intestates' real estates and distribution of their personal estates, and for other purposes therein mentioned, passed the nineteenth day of April, seventeen hundred and niety-four," approved April 7, 1830, P. L. 347, absolutely.

Sections 6, 14, 15, 16, 18 to 24 inclusive, 26 to 30 inclusive, 43 and 44 of an act entitled "An Act relating to registers and registers' courts," approved March 15, 1832, P. L. 135, absolutely.

Sections 5 to 34 inclusive, 47, 53 and 54 of an act entitled "An Act relating to orphans' courts," approved March 29, 1832, P. L. 190, absolutely.

Sections 1 to 41 inclusive, 43, 45 to 61 inclusive, 66, 67 and 68 of an act entitled "An Act relating to executors and administrators," approved February 24, 1834, P. L. 73, absolutely.

Sections 1 and 3 of an act entitled "Supplement to the act passed the twenty-ninth day of March, Anno Domini, one thousand eight hundred and thirty-two, entitled 'An Act relating to orphans' courts,'" approved April 14, 1835, P. L. 275, absolutely.

Section 12 and 13 of an act entitled "A supplement to the act entitled 'An Act to establish the district court for the city and county of Philadelphia,' passed the twenty-eighth day of March, one thousand eight hundred and thirty-five," approved March 11, 1836, P. L. 76, in so far as they relate to testamentary trustees.

Sections 15 to 21 inclusive and 23 to 26 inclusive of an act entitled "An Act relating to assignees for the benefit of creditors, and other trustees," approved June 14, 1836, P. L. 628, in so far as they relate to testamentary trustees.

Section 3 of an act entitled "An Act supplementary to the various acts relating to orphans' and registers courts, and executors and administrators, and the act relating to the measurement of grain, salt, and coal," approved June 16, 1836, P. L. 682, absolutely.

Section 2 of an act entitled "An Act to empower the court of common pleas for the city and county of Philadelphia to appoint assignees or trustees in the place of the deceased assignees or trustees of John Vaughan, and for other purposes," approved March 17, 1838, P. L. 80, in so far as it relates to the orphans' court.

Sections 1 and 2 of an act entitled "A further supplement to an act, entitled 'An Act relating to orphans' courts,' passed the twenty-ninth day of March, one thousand eight hundred and thirty-two, and the supplement thereto, passed the fourteenth of April, one thousand eight hundred and thirty-five, and for other purposes," approved April 13, 1840, P. L. 319, absolutely.

Section 1 of an act entitled "An Act relating to orphans'

courts, and for other purposes," approved October 13, 1840, P. L. (1841) 1, absolutely.

Section 5 of an act entitled "A further supplement to the act entitled 'An Act to establish the district court of the city and county of Philadelphia,' passed the twenty-eighth day of March, one thousand eight hundred and thirty-five, and for other purposes," approved March 12, 1842, P. L. 66, absolutely.

Section 52 of an act entitled "An Act concerning the trust estate of Hugh Roberts, deceased, and for other purposes," approved July 16, 1842, P. L. 374, absolutely.

Section 22 of an act entitled "An Act to authorize the governor to incorporate the Delaware Canal Company, and for other purposes," approved April 13, 1843, P. L. 237, absolutely.

Section 9 of an act entitled "An Act in regard to certain entries in ledgers in the city of Pittsburg, and relating to the publishing of sheriffs' sales, and for other purposes," approved April 22, 1846, P. L. 476, absolutely.

Section 1 of an act entitled "An Act relative to the appointment of trustees by orphans' court, and for other purposes," approved April 22, 1846, P. L. 483, absolutely.

An act entitled "An Act to enable the executors and administrators of decedents to perfect title to real estate in certain cases," approved February 8, 1848, P. L. 27, absolutely.

Section 9 of an act entitled "A supplement to an act, entitled 'An Act relative to the LeRaysville Phalanx,' passed March, Anno Domini one thousand eight hundred and forty-seven, and relative to obligors and obligees, to secure the right of married women, in relation to defalcation, and to extend the boundaries of the borough of Ligioner," approved April 11, 1848, P. L. 536, in so far as it relates to letters of administration.

An act entitled "An Act relative to sales made by persons acting in a fiduciary capacity," approved March 14, 1849, P. L. 164, in so far as it relates to powers to sell or

let real estate on ground rent, contained in any will or testamentary writing.

Section 2 of an act entitled "A further supplement to an act, entitled 'An act authorizing the Governor to incorporate the Mill Creek and Mine Hill navigation and railroad company,' passed the seventh day of February, Anno Domini, one thousand eight hundred and twenty-eight; and in relation to orphans' court deeds," approved April 9, 1849, P. L. 511, absolutely.

Sections 5, 13 and 16 of an act entitled "A supplement to an act relative to the venders of mineral waters; and an act relative to the Washington Coal Company; to sheriffs' sales of real estate; to the substitution of executors and trustees when plaintiffs; to partition in the courts of common pleas, and for other purposes," approved April 9, 1849, P. L. 524, absolutely.

Section 2 of an act entitled "An Act relative to sheriffs' sales, and to the appointment of trustees in the county of Philadelphia, and to the appointment of trustees; incorporating the First Presbyterian Church of Pottstown, Montgomery County, and changing the venue of a certain suit in Huntingdon County," approved April 10, 1849, P. L. 597, absolutely.

Section 1 of an act entitled "An Act relating to conveyances by trustees," approved March 14, 1850, P. L. 195, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

Sections 1, 5 and 44 of an act entitled "An Act relating to the bail of executrixes; to partition in the orphans' court and common pleas; to colored convicts in Philadelphia; to the limitation of actions against corporations; to actions enforcing the payment of ground rent; to trustees of married women; to appeals from awards of arbitrators by corporations; to hawkers and pedlers in the counties of Butler and Union; to the payment of costs in actions by informers in certain cases; to taxing lands situate in different townships; and in relation to fees of county treasurers of Lycoming, Clinton and Schuylkill; to provide for recording the accounts of

executors, administrators, guardians and auditors' reports; and to amend and alter existing laws relative to the administration of justice in this commonwealth," became a law April 25, 1850, by reason of the Governor's failure to return it within ten days, P. L. 569, absolutely.

Sections 22 and 23 of an act entitled "An Act to incorporate the Wyoming County Mutual Insurance Company; relating to Library Street, in the city of Philadelphia; giving jurisdiction to the court of common pleas in Tioga County, in a certain divorce case; and relating to paving in front of the prison in the county of Philadelphia," approved April 26, 1850, P. L. 577, except in so far as they relate to recognizances in partition, and section 25 of said act, absolutely.

Section 8 of an act entitled "An act relative to the Columbia Lyceum and Mechanics' Institute; to the act relating to inspections; to the claims of David King, of Venango county, and of the heirs of John Bennet, of Lycoming county, deceased; to authorize James T. Crabb to sell certain gun-powder in the County of Philadelphia; relative to the estate of Francis Harley, senior, deceased; and a supplement to an act relating to registers and registers' courts, passed March fifteenth, one thousand eight hundred and thirty-two," approved May 15, 1850, P. L. 764, absolutely.

Section 6 of an act entitled "An Act supplementary to an act passed the twenty-ninth day of March, one thousand eight hundred and thirty-two, entitled 'An act relating to orphans' courts,' and relating to contracts of decedents and escheats in certain cases, and relative to the District Court of the City and County of Philadelphia, and to Registers of Wills," approved April 3, 1851, P. L. 305, absolutely.

Section 5 of an act entitled "An Act relating to the commencement of actions to judgments and decrees for the payment of money to the widows and children of decedents, to partitions in the common pleas, relative to penalties on telegraph operators, to pleadings in certain actions of debt, to actions of ejectments, to the protection

of fences, to partnerships, to limitations of writs of entry in manors, lands, and tenements, to the exemption laws, to reports of the supreme court, to appeals relating to wards, boroughs, and township officers, to the acknowledgments of deeds and sequestration of life estates," approved April 14, 1851, P. L. 612, absolutely.

Section 18 of an act entitled "An Act to incorporate a company to erect a bridge over the river Schuylkill at Spring Mill, in Montgomery County, relative to the nineteenth section of 'An Act regulating certain election districts, &c.' approved March twenty-ninth, eighteen hundred and fifty-one, to school directors in Philadelphia county, to actions for damages sustained by injuries done to the person by negligence or default, relative to the accounts of John Humes, deceased, to authorize the trustees of the Seventh Presbyterian Church of Philadelphia to convey certain real estate, to security for moneys loaned by wives to husbands, to unpaid school taxes in Bradford County, and relative to service of process on agents of joint stock companies," approved April 15, 1851, P. L. 669, absolutely.

An act entitled "A supplement to an act relating to executors and administrators, passed February twenty-fourth, one thousand eight hundred and thirty-four," approved February 2, 1853, P. L. 31, absolutely.

An act entitled "An Act to give power to the orphans' court to grant relief in certain cases," approved February 23, 1853, P. L. 98, absolutely.

Section 1 of an act entitled "An Act relative to bringing suits by creditors and others against executors, administrators, assignees and other trustees in certain cases, and serving notices and for satisfaction of mortgages, and opening judgments in certain cases," approved March 27, 1854, P. L. 214, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

Section 2 of an act entitled "A suppplement to an act, entitled 'An Act relating to the sale and conveyance of real estate,'" approved April 13, 1854, P. L. 368, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "A supplement to the act relating to executors and administrators," approved May 5, 1854, P. L. 570, absolutely.

Sections 2 to 5 inclusive of an act entitled "A supplement to an act relating to assignees for the benefit of creditors and other trustees," approved May 3, 1855, P. L. 415, in so far as they relate to testamentary trustees.

Section 4 of an act entitled "An Act relating to the rights of property of husband and wife," approved April 11, 1856, P. L. 315, absolutely.

An act entitled "An Act respecting the estates of non-resident wards," approved April 21, 1856, P. L. 495, absolutely.

Section 8 of an act entitled "An Act for the greater certainty of title and more secure enjoyments of real estate," approved April 22, 1856, P. L. 532, absolutely.

An act entitled "An Act relating to testamentary trustees," approved March 13, 1859, P. L. 611, absolutely.

Section 1 of an act entitled "An Act relative to orphans' courts," approved March 22, 1859, P. L. 207, absolutely.

An act entitled "A supplement to the act, entitled 'An Act relating to executors and administrators,' approved the twenty-fourth day of February, Anno Domini, one thousand eight hundred and thirty-four," approved April 6, 1859, P. L. 384, absolutely.

An act entitled "An Act to extend the jurisdiction of the orphans' courts in case of testamentary trusts," approved April 7, 1859, P. L. 406, absolutely.

An act entitled "An Act relative to the exemption of three hundred dollars, and to the widows and children of decedents," approved April 8, 1859, P. L. 425, in so far as it relates to the exemption allowed to the widow or children of any decedent.

An act entitled "An Act relating to executors, administrators and guardians," approved April 13, 1859, P. L. 604, absolutely.

An act entitled "An Act relative to the lien of legacies," approved May 1, 1861, P. L. 420, absolutely.

An act entitled "An Act authorizing surviving executors and administrators to execute and deliver deeds of conveyance in certain cases," approved May 1, 1861, P. L. 431, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act relating to executors and other trustees," approved May 1, 1861, P. L. 680, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act regulating certain charges of executors and trustees," approved March 17, 1864, P. L. 53, absolutely.

An act entitled "An Act extending the provisions of the second section of the act of April tenth, one thousand eight hundred and forty-nine, entitled 'An Act relative to sheriffs' sales, and the appointment of trustees, in the county of Philadelphia, et cetera,' to the several counties of this commonwealth," approved April 23, 1864, P. L. 550, absolutely.

An act entitled "An Act relating to the appointment of guardians," approved August 25, 1864, P. L. 1029, absolutely.

An act entitled "An Act providing additional remedies against trustees of a trust created for life, or during marriage, and providing a remedy for the protection of their sureties," approved March 27, 1865, P. L. 44, in so far as it relates to testamentary trustees.

An act entitled "An Act supplementary to the act to set apart, for the use of the widow, or children, of a decedent, three hundred dollars of the estate of said decedent, approved April fourteenth, one thosuand eight hundred and fifty-one," approved November 27, 1865, P. L. (1866) 1227, absolutely.

An act entitled "Supplement to an act, entitled 'An Act providing additional remedies against trustees of a trust, created for life, or during marriage, and providing a remedy for the protection of their sureties,' approved March twenty-seventh, one thousand eight hundred and sixty-five," approved April 17, 1866, P. L. 111, in so far

as it relates to trustees subject to the jurisdiction of the orphans' court.

An act entitled "An Act enlarging the powers of the orphans' court, so as to discharge liens on real estate," approved May 17, 1866, P. L. 1096, absolutely.

An act entitled "A supplement to the act of the fifteenth of March, Anno Domini one thousand eight hundred and thirty-two, entitled 'An Act relating to registers and registers' courts,'" approved April 15, 1867, P. L. 86, absolutely.

An act entitled "An Act to authorize the court of common pleas and orphans' court of the city of Philadelphia to appoint and remove trustees," approved April 9, 1868, P. L. 785, in so far as it relates to trustees subject to the jurisdiction of the orphans' court.

An act entitled "An Act relating to orphans' courts, conferring upon said courts power to define boundaries in certain cases of devises and conveyances for life or term of years," approved April 14, 1868, P. L. 97, absolutely.

Section 1 of an act entitled "An Act relating to the appointment of auditors in the courts of the county of Montgomery," approved February 18, 1869, P. L. 183, absolutely.

An act entitled "An Act relative to actions of trespass and for mesne profits," approved April 12, 1869, P. L. 27, absolutely.

An act entitled "An Act for the protection of contingent interests," approved April 17, 1869, P. L. 70, absolutely.

An act entitled "An Act relating to the appraisement of real estate devised by any last will and testament within this commonwealth," approved April 17, 1869, P. L. 72, absolutely.

An act entitled "A supplement to an act relating to assignees for the benefit of creditors and other trustees, approved June fourteenth, one thousand eight hundred and thirty-six," approved May 17, 1871, P. L. 269, in so far as it relates to fiduciaries appointed by the orphans' court or by virtue of any last will or testament.

An act entitled "A further supplement to an act entitled, 'An Act relating to executors and administrators, approved twenty-fourth February, one thousand eight hundred and thirty-four," approved May 17, 1871, P. L. 269, absolutely.

An act entitled "A further supplement to an act, entitled 'A further supplement to an act relating to orphans' courts,' passed the twenty-ninth day of March, one thousand eight hundred and thirty-two, and the supplement, passed fourteenth of April, one thousand eight hundred and thirty-five, and the further supplement, passed fourteenth of April, one thousand eight hundred and forty," approved May 25, 1871, P. L. 279, absolutely.

An act entitled "An Act providing for the entry of certain proceedings on the judgment indexes of the several courts of this commonwealth," approved June 15, 1871, P. L. 387, in so far as it relates to proceedings to revive and continue the lien of debts against a decedent's real estate.

An act entitled "An Act relating to foreign executors, administrators, guardians and representatives of decedents and wards," approved April 8, 1872, P. L. 44, absolutely.

An act entitled "An Act to provide for the recording of deaths of testators and intestates in the office of register of wills," approved May 15, 1874, P. L. 194, absolutely.

An act entitled "An Act relative to the transfer of the loans of this commonwealth, and of the city of Philadelphia, and to amend the provisions of the twenty-second section of an act, entitled 'An Act to authorize the Governor to incorporate the Delaware Canal Company, and for other purposes,' approved the thirteenth day of April, eighteen hundred and forty-three, and extending the same to the holders of any loans of this commonwealth, or of the city of Philadelphia, domiciled or resident out of this commonwealth, who shall have heretofore died or hereafter die," approved May 15, 1874, P. L. 195, absolutely.

The proviso to Section 6 of "An Act relating to the organization and jurisdiction of orphans' courts, and to establish a separate orphans' court in and for counties having more than one hundred and fifty thousand inhabitants, and to provide for the election of judges thereof," approved May 19, 1874, P. L. 206, absolutely.

An act entitled "An Act to validate sales and conveyances, under the decrees of courts of this commonwealth, by persons irregularly or improperly appointed or defectively qualified," approved April 28, 1876, P. L. 50, in so far as it relates to proceedings in the orphans' court.

An act entitled "A further supplement to an act, entitled 'An Act relating to orphans' court,' approved the twenty-ninth day of March, Anno Domini one thousand eight hundred and thirty-two, designed to extend the fourteenth section of said act, so as to authorize investments by executors, trustees and other persons holding property in a fiduciary capacity in bonds or certificates of debt created by any of the counties, cities or municipal corporations of this commonwealth," approved May 8, 1876, P. L. 133, absolutely.

An act entitled "An Act relating to the execution of trusts by corporations," approved February 16, 1877, P. L. 3, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

Sections 1 and 2 of an act entitled "An Act to provide for and to validate the execution and delivery of deeds and conveyances of real estate, in cases in which administrators, executors, guardians and trustees, may die or have died, between the time of sale and the time appointed for the payment of purchase money and delivery of the conveyance, and also in cases in which the administrator, executor, guardian or trustee may have received authority from the proper court to purchase real estate sold by him, either under the provisions of any last will and testament, or by the authority or under the direction of any court having jurisdiction to make a decree, directing such real estate to be sold,"

approved May 22, 1878, P. L. 83, in so far as they relate to the orphans' court.

Sections 1, 2 and 3 of an act entitled "An Act to provide for the appointment of trustees *durante absentia*, and defining the powers and duties of the same," approved April 11, 1879, P. L. 21, absolutely.

An act entitled "An Act to regulate the compensation of auditors and commissioners," approved June 4, 1879, P. L. 84, in so far as it relates to auditors and commissioners appointed by the orphans' court.

An act entitled "A supplement to extend the provisions of an act, entitled 'An Act providing additional remedies against trustees of a trust created for life, or during marriage, and providing a remedy for the protection of their sureties,' approved the twenty-seventh day of March, Anno Domini, one thousand eight hundred and sixty-five, to the orphans' courts of the respective counties of this commonwealth," approved May 10, 1881, P. L. 14, in so far as it relates to trustees subject to the jurisdiction of the orphans' court.

An act entitled "A supplement to an act, approved April thirteen, one thousand eight hundred and fifty-nine, entitled 'An Act relating to executors, administrators and guardians,'" approved June 10, 1881, P. L. 106, absolutely.

An act entitled "An Act to confer power on the several orphans' courts having jurisdiction of the accounts of executors and administrators to order and direct a sale for the payment of the debts of such decedent of any lands lying partly in two or more counties," approved June 4, 1883, P. L. 65, absolutely.

An act entitled "An Act providing the manner in which widows' and children's exemption in decedents' estates shall and may be set aside to them in certain cases," approved June 4, 1883, P. L. 74, absolutely.

An act entitled "An Act to permit foreign executors or administrators to issue *scire facias* to preserve and continue the lien or liens of judgments in favor of decedents within this commonwealth, and before letters of adminis-

tration have been taken out within this state," approved June 27, 1883, P. L. 163, absolutely.

An act entitled "An Act relating to the grant of letters of administration upon the estates of persons, presumed to be dead, by reason of long absence from their former domicile," approved June 24, 1885, P. L. 155, absolutely.

An act entitled "An Act limiting the time within which action may be brought upon refunding bonds given upon the distribution or partition of estates of decedents," approved June 30, 1885, P. L. 203, absolutely.

An act entitled "An Act authorizing executors or trustees to unite with others in the organization of corporations," approved April 22, 1889, P. L. 42, absolutely.

An act entitled "An Act to authorize courts, having cognizance of trusts created by deed or will, to direct trust funds to be placed in the custody of trustees appointed by the courts of another state or territory of the United States, in cases where the person or persons beneficially interested in such trust have removed to such other state or territory of the United States," approved May 8, 1889, P. L. 123, in so far as it relates to trusts created by will.

An act entitled "An Act relating to orphans' court sales," approved May 9, 1889, P. L. 182, absolutely.

An act entitled " An Act amending an act, entitled 'An Act respecting the estate of non-resident wards,' approved the twenty-first day of April, Anno Domini one thousand eight hundred and fifty-six, extending the provisions thereof so that the same may apply to trustees and *cestui que trusts*," approved May 13, 1889, P. L. 190, absolutely.

Section 2 of an act entitled "An Act relating to judicial sales and the preservation of the lien of mortgages," approved May 19, 1893, P. L. 110, absolutely.

An act entitled "An Act to enable the surety of any trustee, committee, guardian, assignee, receiver, administrator, executor, or other trustee, or any person interested in the trust, to require the filing of statements exhibiting the manner of the investment of the trust funds, and

providing for the removal of such trustee, committee, guardian, assignee, receiver, administrator, executor, or other trustee, by the court," approved June 3, 1893, P. L. 273, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act regulating the satisfaction, extinguishment or discharge of dowers, legacies or other charges upon land, by judicial decree where the legal presumption of payment of the same exists from lapse of time, or where payment of the same has been made in full and no satisfaction, extinguishment, release thereof appears of record," approved June 8, 1893, P. L. 356, absolutely.

An act entitled "An Act to limit the duration of the lien of the debts of decedents other than those of record on their real estate," approved June 8, 1893, P. L. 392, absolutely.

An act entitled "An Act providing for the release and discharge of encumbrances or charges on land in all cases in which the period of twenty-one years has elapsed after the principal of the encumbrance or charge has become due and payable, and no payment has been made within such period of twenty-one years on account of such encumbrance or charge by the owner or owners of the land sought to be released and discharged and no sufficient release is of record in the county, and regulating proceedings for such release and discharge," approved May 8, 1895, P. L. 44, in so far as it relates to the orphans' court.

An act entitled "A supplement to an act, entitled 'An Act relating to executors and administrators,' approved February twenty-fourth, one thousand eight hundred and thirty-four, relating to the lien of judgments against decedents," approved June 18, 1895, P. L. 197, absolutely.

Section 1 of an act entitled "An Act providing that the right of action for injury wrongfully done to the person shall survive against the personal representative of the wrong-doer, and limiting the time within which suit for

such injury must be brought," approved June 24, 1895, P. L. 236, absolutely.

An act entitled "An Act to allow receivers, assignees, guardians, committees, trustees, executors and administrators to include in the lawful expenses of executing their trusts such reasonable sum paid a company, authorized under the laws of this state so to do, for becoming their surety as may be by court allowed, not exceeding one per centum per annum on the amount of such bonds," approved June 24, 1895, P. L. 248, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act to authorize executors and trustees, non-residents of the commonwealth, to convey real estate," approved June 23, 1897, P. L. 200, absolutely.

An act entitled "An Act authorizing the payment into the orphans' court of the money due on dowers, legacies or other charge upon land where the person or persons to whom the dower, legacy or other charge upon land is due and payable cannot be found, and providing for the satisfaction, extinguishment or discharge thereof, and to ascertain the amount thereof," approved July 14, 1897, P. L. 269, absolutely.

An act entitled "An Act enlarging the powers of the orphans' court, and to provide a further remedy for the collection of dower interest due to widows," approved April 28, 1899, P. L. 120, absolutely.

An act entitled "An Act authorizing the orphans' courts of the commonwealth to decide specific performance of written contracts, and also parol contracts when so far executed that it would be inequitable to rescind, for the sale of real estate, where the vendor has died without conveying, and in cases where the vendee has died without having paid the purchase money, and authorizing the recording of the decrees in such cases in the counties where the real estate lies," approved April 28, 1899, P. L. 157, absolutely.

An act entitled "An Act to allow an executor, administrator, guardian, assignee, or trustee to institute an action

at law, or other legal or equitable proceedings, against a co-executor, administrator, guardian, assignee or trustee, to recover or enforce any debt or obligation individually due the estate which he represents," approved May 11, 1901, P. L. 174, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act to confer on the several orphans' courts having jurisdiction of the accounts of guardians, power to order and direct a mortgage or a public or private sale, for the payment of debts or for other purposes, of any lands lying partly in two or more counties, divided by county lines," approved May 21, 1901, P. L. 272, absolutely.

An act entitled "An Act to amend the first section of an act, entitled 'An Act to limit the duration of the lien of the debts of decedents, other than those of record, on their real estate,' approved the eighth day of June, Anno Domini one thousand eight hundred and ninety-three, and to extend the provisions of said act so as to limit the duration of the lien upon real estate of the decedents, other than those secured by mortgage or by judgment entered or revived by *scire facias* within five years prior to the death of such decedent," approved June 14, 1901, P. L. 562, absolutely.

Section 1 of an act entitled "An Act authorizing the orphans' court to adjudge real estate to persons, to whom the right to take the same at a certain valuation has been given in a will, and who are appointed executors of the same will; providing for the payment of the purchase money, and confirming titles to real estate heretofore taken under similar proceedings," approved March 5, 1903, P. L. 10, absolutely.

An act entitled "An Act providing for the voting of shares of stock in corporations in this commonwealth, held by executors, administrators, guardians, and trustees, and the manner of voting the same," approved March 16, 1905, P. L. 42, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' Court.

An act entitled "An Act to amend the first section of

an act approved the eleventh day of April, Anno Domini one thousand eight hundred and seventy-nine, entitled 'An Act to provide for the appointment of trustees *durante absentia*, and defining the powers and duties of the same,' providing for the appointment of a trustee of the estate of any absentee, who has been a resident of this commonwealth or of any other state, territory or foreign country, who has left either real or personal estate, or both, in this commonwealth," approved March 30, 1905, P. L. 77, absolutely.

An act entitled "An Act to regulate the transfer of funds from executors and administrators, in this commonwealth, to foreign executors and administrators," approved March 31, 1905, P. L. 91, absolutely.

An act entitled "An Act to extend the statute of limitations to debts or demands arising or falling due to the estate of a decedent after the death of such decedent," approved April 6, 1905, P. L. 114, absolutely.

An act entitled "A supplement to an act, entitled 'An Act relating to the granting of letters of administration upon the estates of persons, presumed to be dead, by reason of long absence from their former domicile,' approved June twenty-fourth, one thousand eight hundred and eighty-five; providing for the probate of a will of a person whose death, by presumption has been established, and for attachment of such will to letters of administration granted in the case," approved April 14, 1905, P. L. 153, absolutely.

An act entitled "An Act to amend an act approved the seventeenth day of May, one thousand eight hundred and sixty-six, entitled 'An Act enlarging the powers of the orphans' court, so as to discharge liens on real estate,' so as to include charges on real estate by the provisions of a last will and testament, or otherwise," approved March 22, 1907, P. L. 29, absolutely.

An act entitled "An Act authorizing employers to pay to the wife, children, brother or sister, father or mother, boarding-house keeper, undertaker, nurse, or physician wages due a deceased employe," approved May 23, 1907, P. L. 201, absolutely.

An act entitled "An Act to allow receivers, assignees, guardians, committees, trustees, executors, and administrators to include in the lawful expenses of executing their trust such reasonable sum paid a company, authorized under the laws of this state so to do, for guaranteeing the payment of the principal and interest of mortgages or other securities in which they are required to invest the funds of their estate, not exceeding one-half of one per centum per annum on the principal of such mortgage or other securities," approved May 28, 1907, P. L. 271, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act to provide for the discharge of sureties upon bonds of trustees, committees, guardians, assignees, receivers, executors, administrators, and other fiduciaries," approved June 1, 1907, P. L. 384, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act authorizing the parties in interest, or their counsel, to select auditors and masters needed in judicial proceedings; except in divorce cases," approved April 1, 1909, P. L. 95, in so far as it relates to proceedings in the orphans' court.

An act entitled "An Act to amend sections twenty-nine and thirty of an act, approved the twenty-ninth day of March, Anno Domini eighteen hundred and thirty-two, entitled 'An Act relating to orphans' courts,' and validating execution and attachment execution process issued out of the courts of common pleas of this commonwealth, upon transcripts from any orphans' court of this commonwealth, for balances due from, or in the hands of, any executor, administrator, guardian, or other accountant, on the settlement of their respective accounts in the orphans' court," approved April 27, 1909, P. L. 202, except in so far as it relates to proceedings begun prior to its date.

An act entitled "An Act to limit the duration upon real estate of the debts of decedents, including the expenses of the settlement of the estate, and to provide under what

conditions the lien may be continued," approved May 3, 1909, P. L. 386, absolutely.

An act entitled "An Act to provide for the filing, auditing, and confirmation, in certain cases, of accounts of trustees and of committees of lunatics and of habitual drunkards," approved May 3, 1909, P. L. 391, in so far as it relates to trustees subject to the jurisdiction of the orphans' court.

An act entitled "An Act providing that the widow or children of any decedent dying outside of this commonwealth, but whose estate is settled in this commonwealth, may retain either real or personal property belonging to said estate to the value of three hundred dollars," approved May 6, 1909, P. L. 459, absolutely.

Sections 1, 2 and 3 of an act entitled "An Act relating to private sales of real estate, ordered, decreed, or approved by the orphans' courts; and providing a method of giving notice of such sales, and validating such private sales of real estate, heretofore made under the authority of the orphans' courts, for the payment of debts," approved June 9, 1911, P. L. 724, absolutely.

An act entitled "An Act to amend section ten of an act, approved the twenty-ninth day of March, Anno Domini one thousand eight hundred and thirty-two, entitled 'An Act relating to orphans' courts,' so as to permit the accounts of the guardians of minors' property therein mentioned and described to be examined and audited, and the matters therein contained confirmed by decree of orphans' court, with the same force and effect as the partial accounts of executors, administrators, and temporary trustees are audited, examined, allowed, and confirmed," approved June 9, 1911, P. L. 744, absolutely.

An act entitled "An Act to confer power on the several orphans' courts having jurisdiction thereof, when the balance for distribution in an estate, after the debts are paid, includes stocks, bonds, and other securities, to make distribution of the same in kind to parties entitled thereto, to authorize subsequent sales thereof, and to validate such distributions heretofore made," approved June 10, 1911, P. L. 870, absolutely.

An act entitled "An Act to provide that persons buying real estate in this commonwealth, from executors or trustees named in the last will and testament of any person dying testate, and who hold the same in trust under the provisions thereof, and who make sale of same under the power of sale in said last will and testament contained, shall take title to said real estate free and discharged of any obligation to see to the application of the purchase money," approved June 10, 1911, P. L. 874, absolutely.

An act entitled "An Act to amend an act, approved the eighth day of April, Anno Domini one thousand eight hundred and seventy-two, entitled 'An Act relating to foreign executors, administrators, guardians, and representatives of decedents and wards,' by extending the provisions thereof to the assignment and satisfaction of record of mortgage debts and indentures of mortgage and to the receipt of the interest thereon," approved June 13, 1911, P. L. 890, absolutely.

An act entitled "An Act to amend an act approved the twenty-fourth day of February, one thousand eight hundred thirty-four, entitled 'An Act relating to executors and administrators,'" approved May 23, 1913, P. L. 344, absolutely.

An act entitled "An Act relating to the real estate of persons presumed to be dead, and providing a method of freeing such estate from all claim or interest of such persons," approved May 28, 1913, P. L. 369, absolutely.

An act entitled "A supplement to an act, entitled 'An Act relating to the grant of letters of administration upon the estates of persons, presumed to be dead, by reason of long absence from their former domicile,' approved June twenty-fourth, one thousand eight hundred and eighty-five; providing for the grant of ancillary letters of administration in this commonwealth, upon the estates of persons, presumed to be dead, by reason of long absence from their former domicile, in any other state, territory, or foreign country, who have left personal estate within this commonwealth," approved May 28, 1913, P. L. 373, absolutely.

An act entitled "An Act to amend an act approved the ninth day of June, one thousand nine hundred and eleven, entitled 'An Act relating to private sales of real estate, ordered, decreed, or approved by the orphans' courts; and providing a method of giving notice of such sales, and validating such private sales of real estate, heretofore made under the authority of the orphans' courts, for the payment of debts,'" approved June 12, 1913, P. L. 470, absolutely.

An act entitled "An Act to amend an act, approved the fourteenth day of April, one thousand eight hundred fifty-one, entitled 'An Act relating to the commencement of actions, to judgments and decrees for the payment of money to the widows and children of decedents, to partitions in the common pleas, relative to penalties on telegraph operators, to pleadings in certain actions of debt, to actions of ejectments, to the protection of fences, to partnerships, to limitations of writs of entry in manors, lands and tenements, to the exemption laws, to reports of the supreme court, to appeals relating to wards, boroughs and township officers, to the acknowledgments of deeds and sequestration of life estates,' by regulating the appointment and number of appraisers," approved July 21, 1913, P. L. 877, absolutely.

Section 1 of an act entitled "An Act authorizing the several orphans' courts to empower guardians and trustees of estates of minors to elect, in writing, to take land in fee, which has been ordered to be sold by the provisions of any duly probated will, in lieu of legacies bequeathed or distributable to said minors from the proceeds of such sale, and validating certain elections to take land in lieu of legacies heretofore made pursuant to an order of court," approved July 22, 1913, P. L. 908, absolutely.

An act entitled "An Act authorizing the orphans' court to reduce, under certain circumstances, the bond of any fiduciary; imposing duties on registers of wills in connection therewith," approved May 3, 1915, P. L. 218, absolutely.

An act entitled "An Act relative to estates of decedents," approved May 6, 1915, P. L. 265, absolutely.

An act entitled "An Act to amend an act approved the twenty-fourth day of February, one thousand eight hundred thirty-four, entitled 'An Act relating to executors and administrators,' as amended," approved May 6, 1915, P. L. 267, absolutely.

An act entitled "An Act to amend an act, entitled 'An Act to limit the duration upon real estate of the debts of decedents, including the expenses of the settlement of the estate, and to provide under what conditions the lien may be continued,' approved the third day of May, one thousand nine hundred and nine, so as to restrict the revival of judgment liens by the death of the debtor to real estate still owned by said decedent at the date of his death," approved May 14, 1915, P. L. 475, absolutely.

An act entitled "A supplement to an act approved the fourteenth day of April, one thousand eight hundred and fifty-one, entitled 'An Act relating to the commencement of actions to judgments and decrees for the payment of money to the widows and children of decedents, to partitions in the common pleas, relative to penalties on telegraph operators, to pleadings in certain actions of debt, to actions of ejectments, to the protection of fences, to partnerships, to limitations of writs of entry in manors, lands, and tenements, to the exemption laws, to reports of the supreme court, to appeals, relating to wards, boroughs, and township officers, to the acknowledgments of deeds and sequestration of life estates,' providing a method of allowing a widow's exemption, where the property consists of real estate not readily divided," approved June 1, 1915, P. L. 682, absolutely.

An act entitled "An Act to amend section three of an act, approved the fourteenth day of April, Anno Domini one thousand nine hundred and five, entitled 'A supplement to an act, entitled "An act relating to the granting of letters of administration upon the estates of persons, presumed to be dead, by reason of long absence from their former domicile," approved June twenty-fourth, one thousand eight hundred and eighty-five; providing for the probate of a will of a person whose death by pre-

sumption has been established, and for attachment of such will to letters of administration granted in the case,' by providing for the issuance of letters testamentary to the executor named in such will, in the same manner and form as if such supposed decedent were actually dead," approved June 1, 1915, P. L. 689, absolutely.

An act entitled "An Act to amend section five of an act, entitled 'An Act relating to the grant of letters of administration upon the estates of persons presumed to be dead, by reason of long absence from their former domicile;' approved the twenty-fourth day of June, Anno Domini one thousand eight hundred and eighty-five, by authorizing the several orphans' courts of this commonwealth to accept refunding bonds from the distributees without sureties, in certain cases," approved June 11, 1915, P. L. 945, absolutely.

All other acts of assembly, or parts thereof, that are in any way in conflict or inconsistent with this act, or any part thereof, are hereby repealed.

PARTITION ACT.

TABLE OF CONTENTS.

PAGE

SECTION 1. Jurisdiction of orphans' court 289
(a) In general 289
(b) Coal and timber lands 291
SECTION 2. Petitioners 291
SECTION 3. Citation 293
SECTION 4. Parties respondent; notices to unknown parties 293
SECTION 5. Service outside of state 293
SECTION 6. Appointment of commissioners or award of inquest 294
SECTION 7. Compensation and mileage of commissioners and jurors. 295
SECTION 8. Making of partition by commissioners or inquest 295
SECTION 9. Action of commissioners or inquest where equal partition cannot be made 295
(a) Where no division is possible; valuation of the whole .. 295
(b) Purparts unequal in value 296
(c) Purparts not equal in number to number of parties entitled 296
SECTION 10. Valuation of undivided interest of decedent 297
SECTION 11. Rule to accept or refuse the whole or purparts at the valuation 297
SECTION 12. Bids above valuation 298
SECTION 13. Allotment in the absence of bids 299
(a) Order of choice 299
(b) Offer to next in succession where party entitled fails to appear or refuses to take 300
(c) Election to take real estate or share thereof postpones party as to other shares or as to real estate in other county 300
SECTION 14. Permitting residue of premises to remain for parties not appearing 301
SECTION 15. Allotment to widow as highest bidder 301
SECTION 16. Partition to be firm and stable after final decree 302
SECTION 17. Owelty 302
(a) Payment or security 302
(b) Enforcement of payment by non-resident 303
(c) Appointment of trustee for parties who are unknown or cannot be found 303
SECTION 18. Widow's interest 304
(a) Interest to remain charged on the premises 304
(b) Charging widow's interest on particular purparts 305
SECTION 19. Other undivided life interests to remain charged on real estate 306
SECTION 20. Deduction of rental value from shares of parties who have been in possession 306
SECTION 21. Rule to show cause why sale should not be made; decree of sale 307

PAGE

SECTION 22. Combination of rule to accept or refuse with rule to show cause why sale should not be made 308
SECTION 23. Sales for the purpose of distribution on petition of all parties interested 309
(a) In general 309
(b) Lands in different counties 310
SECTION 24. Appointment of trustee to make sale 310
SECTION 25. Bond of executor, administrator or trustee making sale. 311
SECTION 26. Discharge of liens by sale 311
SECTION 27. Recognizance by purchaser 311
SECTION 28. No obligation to see to application of purchase money .. 312
SECTION 29. Widow's interest to remain in hands of purchaser 313
SECTION 30. Other undivided life interests to remain charged on real estate 313
SECTION 31. Appointment of trustee to hold principal of sum in which there is a life interest 314
SECTION 32. Procedure where executor, administrator or trustee becomes incapable, is removed or dies 315
SECTION 33. Appointment of auditor to ascertain liens or incumbrances 315
SECTION 34. Account of executor, administrator or trustee 316
SECTION 35. Costs and counsel fees 317
(a) In general 317
(b) In cases of sale 317
SECTION 36. Private sales 317
(a) When ordered 317
(b) Notice of sale 318
(c) Setting aside sale 318
SECTION 37. Lands in adjoining tracts in different counties 319
SECTION 38. Lands in different counties but not in adjoining tracts . 320
(a) Where proceedings shall be brought 320
(b) Service of process and notices 321
(c) Selection of commissioners or jurors; compensation and mileage 321
(d) Sales 322
(e) Proceedings not specially provided for in this section .. 322
(f) Filing certified copies in other counties 322
SECTION 39. Recognizances in general 323
(a) Ascertainment of amounts due 323
(b) Satisfaction 323
1. Satisfaction of record 323
2. Remedy for refusing to satisfy 324
SECTION 40. Protection of interests of persons not in esse 324
SECTION 41. Partition docket 325
SECTION 42. Partition index 325
SECTION 43. Appeals 326
SECTION 44. Short title section 326
SECTION 45. Repealer 326

An Act.

Relating to the jurisdiction, powers and procedure of the several orphans' courts in proceedings for the partition and valuation of real estate, and for the sale of real estate for the purpose of distribution, and the fees, costs and expenses therein.

Section 1 (*a*) Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, that the orphans' court of each county of this commonwealth shall have jurisdiction, but not exclusive jurisdiction,[1] in the partition and valuation of real estate, within the county, of any decedent, testate[2] or intestate,[3] whether such decedent was at the time of his death seised or possessed of such real estate solely or as tenant in common or joint owner with any other person or persons,[4] and whether or not the surviving spouse of such decedent shall elect to take against his or her will,[5] and notwithstanding there may be a limitation of an estate or interest in the premises or some part thereof, to a person or persons not in existence;[6] and several undivided interests in any premises, derived from different ancestors by descent or devise, may be parted or valued in one proceeding in said court:[7] *Provided*, That such court shall not have such jurisdiction during the continuance of any life estate in the whole of such real estate.[8]

Note.—This is a new section combining the provisions of the various acts relating to the jurisdiction of the orphans' court in partition. The derivation of the different clauses is shown in the special notes below.

Special Notes to Section 1.

[1] Derived from Section 1 of the Act of April 21, 1846, P. L. 426, 3 Purd. 3451, which provides that the jurisdiction in cases of intestacy shall not be exclusive, and the proviso to Section 4 of the Act of April 13, 1840, P. L. 320, 3 Purd. 3424, which makes similar provision as to cases of testacy.

It seems unnecessary to re-enact the provision of those acts that nothing therein contained shall be construed

to prevent any of the parties interested in the real estate from proceeding by action in partition (or bill in equity) as theretofore.

[2] This covers the provisions of Section 4 of the Act of April 13, 1840, P. L. 320, 3 Purd. 3424; Section 1 of the Act of May 9, 1889, P. L. 146, 3 Purd. 3424; and Section 10 of the Act of April 10, 1849, P. L. 596, 3 Purd. 3424, so far as they confer jurisdiction in cases of testacy.

The Act of 1840 gave jurisdiction where the parties interested or any of them were minors or the course of descent was not altered by the provisions of the will. The Act of 1889 gave jurisdiction in all cases of testacy, without respect to the minority of the parties or their relationship to the testator. The Act of 1849 gave jurisdiction where the whole or part of the real estate was devised to two or more children.

[3] This embodies the jurisdictional provision of Section 36 of the Act of March 29, 1832, P. L. 201, 3 Purd. 3418. This was Section 38 in the draft of the Commissioners of 1830, and was founded upon Section 22 of the Act of April 19, 1794, 3 Sm. L. 143, with various changes.

The Commissioners remarked that in this and the ten succeeding sections they had collected all the provisions relating to partition in the orphans' court which were scattered in various acts, and had endeavored to consolidate and arrange them in order.

[4] This covers the first part of Section 1 of the Act of March 13, 1847, P. L. 319, 3 Purd. 3424.

[5] This covers the jurisdictional provision of Section 2 of the Act of April 20, 1869, P. L. 77, 3 Purd. 3423, and that part of Section 1 of the Act of May 9, 1889, P. L. 146, 3 Purd. 3424, which provides that the orphans' court shall have jurisdiction in all cases of testacy, without respect to "the fact of a widow's election not to take under the will."

[6] These words have been added to make it clear that the orphans' court has jurisdiction in such cases. Section 1 of the Act of June 3, 1840, P. L. 593, and Section 9 of the Act of April 5, 1842, P. L. 234, 3 Purd. 3412-13, refer only to "writs of partition." The second proviso of the Act of 1840 is covered by Section 40 of this draft. The first proviso, as amended by the Act of 1842, is embodied in Section 2, infra.

[7] This incorporates the provision of Section 1 of the Act of February 26, 1869, P. L. 4, 3 Purd. 3425, which was passed because of the decision in Snyder's Appeal, 36 Pa. 166, that the estate of one decedent only could be

partitioned in a proceeding in the orphans' court, which had no jurisdiction where the tract was held in common by the same parties, partly as devisees of their father and partly as heirs of their mother.

[8] The proviso is new, being declaratory of the existing law: Lee's Estate, 13 Phila. 291.

(*b*) Partition may be made under this act of lands and coal-rights therein, and of lands and timber-rights thereon, of any decedent, whether the rights of all the parties be co-extensive with the whole or not; and whether the rights of some of them extend only to the lands and part of the coal therein, or only to the land and part of the timber thereon, or only to an undivided interest in the land, or in the coal therein or in the timber thereon; and any person having an interest as herein set forth may compel partition of the entire tract of land and coal, or land and timber, provided said coal or said timber has not been entirely severed so as to constitute a separate estate.

NOTE.—This is Section 1 of the Act of May 6, 1915, P. L. 269, 6 Purd. 7052, amending Section 3 of the Act of May 14, 1874, P. L. 156, 3 Purd. 3449. In the first line, "this act" has been substituted for "existing laws."

The repeal of the acts mentioned is recommended only so far as they relate to the orphans' court.

SECTION 2. The jurisdiction of the orphans' court under this act shall be exercised on the petition of the surviving spouse of the decedent, of any heir of the decedent in a case of intestacy, or of any devisee having an interest in the real estate in question in a case of testacy, whether the interest of such person be vested in possession or in remainder, or of any person having a life interest in an undivided share of such real estate, or of any alienee or devisee of any party in interest. If the party be a weak-minded person for whom a guardian has been appointed, or a minor, lunatic or habitual drunkard, the petition shall be filed by the guardian or committee of such party.

NOTE.—This is founded on part of Section 36 of the Act of March 29, 1832, P. L. 201, 3 Purd. 3418. That section relates only to cases of intestacy and provides for application by the widow or any lineal descendant. It is now extended to include a surviving husband and collateral heirs, parties entitled in remainder, and alienees or devisees of parties in interest. Provision is also made for the cases of lunatics, etc., as well as minors. This covers the provisions of Section 1 of the Act of March 22, 1865, P. L. 31, 3 Purd. 3450, so far as they relate to partition in the orphans' court. The provision as to life tenants of undivided shares corresponds to the Acts of 1840 and 1842, referred to in Note 6 to Section 1 (*a*) supra.

Section 46 of the Act of 1832, 3 Purd. 3432, reads: "When the decedent leaves no lineal descendants, the like proceedings shall be had in all respects, on the application of the persons in whom the estate shall vest in possession." This is covered by the present section of the new draft. Under Section 46 it was held that jurisdiction was conferred only when the application was made by those in whom the estate vested in possession, and a collateral heir, entitled in remainder only, had no standing: Negley's Estate, 23 Pitts. L. J. 41; Deshong's Estate, 6 Del. Co. 519. Under the revised Intestate Act, collateral heirs will not take if there are any lineal descendants, and when collateral heirs do take their interests will vest at once, since the life estates of surviving spouses and of parents are abolished.

Section 1 of the Act of June 26, 1895, P. L. 381, amended by the Act of June 10, 1901, P. L. 553, 3 Purd. 3450, and Section 2 of the Act of 1895, 3 Purd. 3451, provide for the appointment of a committee *ad litem* for lunatic defendants "in all actions or proceedings in partition, and in all other actions and proceedings whatsoever, either at law, in equity or in the orphans' court." It seems unnecessary to repeat these provisions in the Partition Act.

Section 8 of the Act of April 24, 1843, P. L. 360, 3 Purd. 3434, providing a method for securing, before partition, the widow's dower interest in property which was owned by the decedent in common or coparcenary with others, is recommended for repeal as unnecessary, in view of the provisions of Sections 2 and 12 of this draft.

The local Act of February 13, 1867, P. L. 160, 3 Purd. 3435, provides that in all cases of testacy, on the petition of the widow or of her personal representative, the court shall have power to appoint commissioners or award

an inquest for the purpose of making partition or valuation of the dower of the widow. This act relates to York and Fayette Counties.

SECTION 3. On such petition, supported by oath or affirmation, the court may award a citation, returnable at a day certain, not less than ten days after the issuing thereof, directed to all the parties in interest other than the petitioner or petitioners, to show cause why an inquest in partition should not be awarded. Such citation shall be served in the manner provided by law for the service of other citations in the orphans' court.

NOTE.—This is a new section, modeled on Clause 1 of Section 57 of the Act of March 29, 1832, 3 Purd. 3373. It seems unnecessary to repeat in this act the provisions as to service, publication, etc., contained in the Orphans' Court Act.

SECTION 4. All parties in interest, including those entitled in remainder, shall be named in the petition, citation, decree and notices, when known; but if it shall appear, on oath or affirmation, that the names or residences of any of the parties are unknown to the petitioner for the partition, the orphans' court shall have the power to direct such notices as shall appear to the court to be reasonable and proper to be given to such parties by publication, describing the parties, as far as practicable; and the proceedings shall be as effectual, to all intents and purposes, as if all the parties had been named in the proceedings.

NOTE.—This is Section 2 of the Act of April 14, 1835, P. L. 275, 3 Purd. 3425, extended to cases of testacy as well as intestacy.

The following words have been inserted: "including those entitled in remainder," and "citation," and the words "in the public newspapers" have been omitted.

SECTION 5. Where any of the parties in interest reside outside the commonwealth of Pennsylvania and their places of residence are known, the court may, in its dis-

cretion, authorize any citations or notices provided for by this act, to be served upon them personally or by registered mail, or direct publication thereof.

NOTE.—This is a new section. Where the residence of a party is known and he can be personally served, constructive notice by publication is not only unnecessarily expensive but futile. The proceeding being one *in rem*, there can be no objection to service outside of the state which would not apply equally to service by publication.

SECTION 6. If, on the return of such citation, no answer or an insufficient answer be filed, or if, after hearing on petition, answer, replication and proofs, it shall appear proper, the court may appoint, on the agreement and nomination of the parties, three or more commissioners to divide or value the real estate described in the petition, with the same effect as a sheriff's inquest for the same purpose, or, if the parties cannot so agree, may award an inquest to make partition among the parties in accordance with their respective interests, the inquest to consist of three men.

NOTE.—The first three lines, to the word "proper," are new. The provision as to awarding an inquest is taken from Section 36 of the Act of March 29, 1832, P. L. 201, 3 Purd. 3418, except that the words "among the parties in accordance with their respective interests" have been inserted, to cover cases where the interests are unequal, as was done by Section 10 of the Act of April 10, 1849, P. L. 596, 3 Purd. 3424, which related only to devises to two or more children, and is now recommended for repeal.

The provision of Section 36 of the Act of 1832 for the appointment of "seven or more disinterested persons" has been omitted, and the provision of Section 4 of the Act of April 27, 1855, P. L. 369, 3 Purd. 3452, substituted.

The Act of May 1, 1879, P. L. 40, 3 Purd. 3452, reduced the number of jurors from twelve to six. The number is now reduced to three.

The Acts of 1855 and 1879 apply to proceedings in the common pleas as well as in the orphans' court and are recommended for repeal only so far as they relate to the latter court.

SECTION 7. The compensation of such commissioners, and of the jurors when an inquest is awarded, shall be fixed by the court, but shall not exceed five dollars a day each, for each day engaged in making such partition and valuation, unless the parties interested shall agree in writing to a larger compensation. Such commissioners and jurors shall also receive in addition to their daily pay three cents per mile circular for each mile necessarily traveled by them, counting from the place at which said commissioners or jurors first met.

NOTE.—Section 4 of the Act of April 27, 1855, P. L. 369, 3 Purd. 3452, allowed the commissioners three dollars a day and did not provide for mileage. Section 2 of the Act of April 17, 1856, P. L. 386, 3 Purd. 3455, allowed the jurors one dollar per day and mileage.

The Commissioners consider that it is proper to fix the same maximum compensation and to allow mileage in both cases. The increase to five dollars a day is justified in cases involving the services of men experienced in the valuation of real estate. The amount of the compensation is left to the discretion of the court in every case.

SECTION 8. The commissioners or inquest shall, if the same can be done without prejudice to or spoiling the whole, make partition of the real estate in purparts among the parties entitled in accordance with their respective interests, whether such interests be equal or otherwise, and shall make return thereof to the court.

NOTE.—This is a new section, declaratory of the existing law and introduced for the sake of completeness.

The provision for cases where the interests of the parties are not equal is suggested by the second clause of Section 10 of the Act of April 10, 1849, P. L. 596, 3 Purd. 3424, which relates only to devises to two or more children in unequal proportions. The first clause of that section is covered by Section 1 of the present draft, and the last clause is a validating provision. The section is recommended for repeal.

SECTION 9 (*a*) When any such estate cannot be divided among the parties entitled thereto without prejudice to or spoiling the whole, the said commissioners,

or the said inquest, as the case may be, shall make and return a just appraisement thereof to the court.

NOTE.—This is the first part of Section 37 of the Act of March 29, 1832, P. L. 201, 3 Purd. 3427, which was derived from Section 22 of the Act of April 19, 1794, 3 Sm. L. 143.

It is now changed so as to apply in all cases and not merely to cases of intestacy where the real estate descends to the widow and lineal descendants. The word "commissioners" has been substituted in line 3 for "seven or more persons."

The remainder of Section 37 of the Act of 1832 is covered by subsequent sections of this draft.

(*b*) When equal partition in value, or partition in accordance with the respective interests of the parties, cannot be made by the said commissioners or the said inquest, they shall make a just appraisement of the respective purparts or shares into which they may divide the estate; and the court shall award that one or more of the purparts or shares shall be subject to the payment of such sum or sums of money as shall be necessary to equalize the value of the said purparts, according to the said appraisement thereof; which sum or sums of money shall be paid or secured to be paid, by the several persons accepting such purparts, in the manner prescribed in Section 17 hereof.

NOTE.—This is Section 38 of the Act of March 29, 1832, 3 Purd. 3430, which was new in that act and was intended to provide for the case "where partition *can* conveniently be made, but the value of the shares cannot be equal." The words from "or" to "parties" in lines 1 and 2 have been added, to conform to Section 8 of this draft.

The second clause of the section, relating to the order of allotment of the purparts, is omitted here, being covered by Section 13 of this draft.

(*c*) When such estate cannot conveniently be divided into shares equal in number to the number of parties entitled, the said commissioners or the said inquest shall make a just appraisement of the respective purparts or

shares into which they may divide the estate; and the parties to whom such shares shall be awarded, or some one in their behalf, shall pay or secure to be paid to the other parties interested, their respective parts of the value thereof, in the manner prescribed in Section 17 hereof.

NOTE.—This is Section 39 of the Act of March 29, 1832, 3 Purd. 3431, which was derived in substance from Section 22 of the Act of April 19, 1794, 3 Sm. L. 143. In line 2, "shares equal in number to the number of" has been substituted for "as many shares as there are," the intention being to cover cases where the number of purparts exceeds the number of parties, as well as where there are fewer purparts than there are parties entitled.

The portion of the section dealing with the allotment of the purparts is omitted here, being covered by Section 13 of this draft.

SECTION 10. Where the decedent shall die seised or possessed, as tenant in common or joint owner, of any undivided interest in fee simple in any lands or tenements, the commissioners or inquest shall value and return such interest, undivided, in all cases; and if such decedent had other real estate, such interest shall be valued and returned, either by itself, or in connection with some other portion of such decedent's real estate, as one of the purparts or shares into which they shall divide the whole real estate; and upon the return thereof, the proceedings shall be as in other cases.

NOTE.—This is the last part of Section 1 of the Act of March 13, 1847, P. L. 319, 3 Purd. 3424, the first part of which is covered by Section 1 of the present draft. In line 8, "valued" is omitted before "as one of."

SECTION 11. In all cases of appraisement or partition mentioned in Sections 8 and 9 of this act, the orphans' court shall, on application, grant a rule on all persons interested, including those interested in remainder, to come into court, at a certain day to be fixed by the court, to accept or refuse the estate, or a share or portion thereof, as the case may be. A copy of such rule shall be served

upon each party personally, ten days before the return thereof, in case such party resides within the county, or if any party shall reside outside the county the court may, in its discretion, authorize service of such rule upon him personally or direct such publication thereof as shall appear to the court to be reasonable and proper.

NOTE.—This is founded on Section 40 of the Act of 1832, 3 Purd. 3431. Provisions as to service of the rule similar to those in Section 4 of this draft have been inserted, and Section 8 of the Act of April 7, 1807, P. L. 155, 3 Purd. 3431, is recommended for repeal.

In line 4, "including those interested in remainder" has been inserted, thus incorporating the provisions of Section 46 of the Act of 1832, 3 Purd. 3432, on this subject, and making them apply to cases of testacy as well as intestacy. In line 5, "fixed by the court" has been substituted for "by them to be fixed," because the latter words might well be taken to refer to the parties and not to the court.

Section 40 of the Act of 1832 was founded on Section 8 of the Act of 1807, *supra*, the Commissioners remarking that they had made the provision general, "applying it to all cases of appraisement or partition mentioned in the preceding *sections*." Section 40, however, applies only to the cases mentioned in the preceding *section;* the draft was the same. The section is, therefore, confined to the cases mentioned in Section 39 of the Act of 1832, namely, cases where the estate cannot conveniently be divided into as many shares as there are parties interested. It is now made to include cases where partition is made, where no division is possible, and where the purparts are of unequal value.

The provision as to service or publication is made uniform with that in Section 17 (*b*) of this draft.

SECTION 12. In all cases of partition of real estate now pending or hereafter to be instituted, in any orphans' court, wherein a valuation shall have been made or shall be made of the whole or parts thereof, the same shall be allotted to such one or more of the parties in interest, whether entitled in possession or in remainder or to an undivided interest for life, and including the surviving spouse of the decedent, who shall, at the return of the rule

to accept or refuse to take at the valuation, offer in writing the highest price therefor above the valuation returned; but if no higher offer be made for such real estate or any part thereof, it shall be allotted or ordered to be sold as herein provided.

NOTE.—This is part of Section 1 of the Act of May 8, 1909, P. L. 489, 6 Purd. 7052, except that the words from "whether entitled" to "decedent" have been substituted for "widow."

The section was an amendment of Section 10 of the Act of April 22, 1856, P. L. 532, 3 Purd. 3453, which had previously been amended by the Act of June 1, 1907, P. L. 364. It applies to the common pleas as well, and is to be repealed only so far as it relates to the orphans' court.

SECTION 13 (*a*) When no bid above the appraisement of such real estate or any part thereof shall be made as provided in Section 12 of this act, the court may order such real estate or part thereof to and among the parties in interest, including those entitled in remainder, as follows:—

First.—To the surviving spouse of the decedent if entitled, under the intestate law or under the will of the decedent, to a share of such real estate or part thereof in fee.

Second.—To the other parties in interest, in the order of their seniority in age.

NOTE.—This clause is new. The inclusion of parties entitled in remainder covers the provision on that subject in Section 46 of the Act of 1832, 3 Purd. 3432. The inclusion of the surviving spouse, entitled in fee, has been inserted to cover cases coming under the operation of the new Intestate Act and cases where the surviving spouse takes an interest in fee under the will of the decedent.

The provision as to seniority in age is substituted for the provisions of Section 37 of the Act of 1832, 3 Purd. 3427, which related only to cases of intestacy, and was derived from Section 22 of the Act of April 19, 1794, 3 Sm. L. 143, and of Section 46 of the Act of 1832, 3 Purd. 3432.

Section 37 of the Act of 1832 applied only to cases where no partition could be made. Section 38, 3 Purd.

3430, provided for allotment of purparts where the value of the purparts was unequal; and Section 39, 3 Purd. 3431, covered the case where the purparts were fewer in number than the parties entitled. The present section of this draft covers all these cases. The other portions of Sections 37, 38 and 39 of the Act of 1832 have been incorporated in Section 9 of this draft.

Section 37 of the Act of 1832 provided for award to the eldest son or if he was dead to his children, if any, in the order of their birth, and preferring males to females, and in like manner, to his other lineal descendants in the same order, and then to the second and other sons and their descendants, and finally to the daughters and their descendants in the same manner.

Section 46 of the Act of 1832, provides that "when the decedent leaves no lineal descendants, the like proceedings shall be had in all respects, on the application of the persons in whom the estate shall vest in possession." Whether this means that the same order of priority is to be followed as among lineal descendants seems not to have been decided. Section 8 of the Act of April 4, 1797, 3 Sm. L. 296, covered the case of the brothers and sisters.

The Commissioners are of opinion that it is better to adopt the simple rule of seniority of age in all cases, whether the persons entitled are lineal descendants or other relatives of the decedent taking under the Intestate Law, or persons taking under his will, who may or may not be related to him.

(*b*) In case the party entitled to a choice do not come into court, in person or by guardian or committee, or attorney duly constituted, or in case he shall refuse the same, a record shall be made thereof, and the court may and shall direct the same to be offered to the next in succession, according to the rules provided in clause (*a*) of this section.

NOTE.—This is taken from the last part of Section 40 of the Act of 1832, 3 Purd. 3431.

(*c*) In any case where a party has elected to take the real estate of a decedent in one county, or any share thereof, if divided into shares, such party shall not have the right of preference or election to take the real estate or any share thereof in any other county, or any other

share in the same county, until all the other parties shall have neglected, after due notice, or refused to take the same at such valuation.

NOTE.—This is Section 45 of the Act of March 29, 1832, 3 Purd. 3432, with the substitution of "a party" for "one of the heirs of a decedent."

The section was founded on Section 9 of the Act of April 7, 1807, P. L. 155, 3 Purd. 3447, which is recommended for repeal.

SECTION 14. The orphans' court having jurisdiction in any case of partition shall have power, wherever it shall appear advisable and proper, to cause the share or shares of the party or parties appearing in court to be allotted and assigned to them, and to permit the residue of the premises to remain for the person or persons entitled thereto, and subject to a future partition among them, if more than one person be so entitled.

NOTE.—This is Section 10 of the Act of April 25, 1850, P. L. 571, 3 Purd. 3453. That section applies to the common pleas as well, and is recommended for repeal only so far as relates to the orphans' court.

SECTION 15. Where the real estate, or any part thereof, shall be allotted to the widow as the highest bidder, two-thirds of the purchase money thereof, in cases where by existing laws the widow is entitled to a dower of one-third in the real estate, and one-half of the purchase money thereof, in cases where by existing laws the widow is entitled to a dower of one-half in the real estate, shall be paid to those entitled thereto, as provided by law; the remaining one-third or one-half of such purchase money as the case may be, shall be paid to a trustee or trustees to be appointed by the court, which trustee or trustees shall give bond in double the amount to be received; the trustee or trustees as aforesaid, shall pay semi-annually, in lieu of dower, the interest on said one-third or one-half of the purchase money, as the case may be, to the widow during her life, and at her death, the said trustee or trustees shall pay the purchase money to such persons as are entitled by law thereto.

NOTE.—This is the remainder of Section 1 of the Act of May 8, 1909, P. L. 489, 6 Purd. 7052. See note to Section 12 of this draft.

The section as it stands will cover cases of widows of persons dying before the new Intestate Act goes into effect.

"Shall pay semi-annually" has been substituted for "be paid annually." Semi-annual payments are recommended for the convenience of the widow. The Act of June 1, 1907, P. L. 364, read "pay annually." The words "be paid annually," which are obviously incorrect, were introduced in the amendment of 1909, presumably by inadvertence.

SECTION 16. Upon return made by commissioners appointed by agreement of the parties, or of the inquisition taken, or when the real estate or any purpart thereof is awarded or allotted by the court, and a final decree is entered, the partition thereby made shall be firm and stable forever, subject only to the right of appeal.

NOTE.—This supplies the last part of Section 36 of the Act of 1832, 3 Purd. 3418, which provides that on return by the commissioners or inquisition the court shall have power to give judgment that the partition thereby made be firm and stable forever. The provision of that section as to costs is covered by Section 35 of this draft.

SECTION 17 (*a*) In every case provided for in Section 12 or Section 13 of this act, the party bidding in or accepting the real estate, or some one on his behalf, shall pay to the other parties interested their proportional parts of the value of such estate, according to the amount of the bid, or the just appraisement thereof, made in manner aforesaid, as the case may be, or shall give good security by recognizance, or otherwise, to the satisfaction of the court, for the payment thereof, with legal interest, at such time or times as in the judgment of the court shall be to the advantage of those entitled to the estate; and the persons to whom or for whose use payment or satisfaction shall be so made, in any of the cases aforesaid, for the respective parts or shares of such real estate, shall be forever barred of all right or title to the same.

NOTE.—This is the last part of Section 37 of the Act of March 29, 1832, P. L. 201, 3 Purd. 3428, extended to all cases covered by Sections 12 and 13 of this draft instead of those cases only which are covered by Section 13. The provision of Section 1 of the Act of May 8, 1876, P. L. 140, 3 Purd. 3432, has been substituted for the words "in some reasonable time, not exceeding twelve months, as the court may direct," after the words "with legal interest." Section 1 of the Act of 1876 is recommended for repeal.

(*b*) Where the court shall decree any share or shares to any person not residing within this commonwealth, with the payment of owelty annexed, it shall be lawful for the court, upon application made by any party lawfully interested in the same, to order a rule upon such party, his or her legal heirs or representatives, requiring the payment of said owelty, at such time and upon such terms and conditions as the court shall direct. If the said rule cannot be served within this commonwealth, the court may, in its discretion, authorize service of such rule upon him or them personally or direct such publication thereof as shall appear to the court to be reasonable and proper. Upon return and proof of service or publication as aforesaid, and upon refusal or neglect to comply with the said rule, the court may enforce the same by ordering a sale of such share or shares, for the purposes aforesaid, as in other cases of sales under this act.

NOTE.—This is Section 1 of the Act of April 6, 1844, P. L. 214, 3 Purd. 3432. The provision as to service by publication in the Act of 1844 is by reference to Section 1 of the Act of March 26, 1808, P. L. 144, 3 Purd. 3408, which relates to actions of partition and provides for publication in one daily newspaper of the City of Philadelphia as well as in a newspaper in the county where the land lies. The reference at the end of Section 1 of the Act of 1844 is to the Act of March 29, 1832.

Provisions for service outside of the state, similar to those in Section 5 of this draft, and for publication, as in Section 11, have been added.

(*c*) Wherever it shall appear that any party or parties, in whose favor a lien exists until payment be made to

them of their respective shares of the money due from the party or parties to whom the real estate or any purpart thereof is awarded at the appraisement or at a price bid therefor above the appraisement, is or are unknown or cannot be found, the court shall have power to appoint a trustee to whom the shares of money due said unknown or other party may be paid, with power in said trustee, upon payment to him of said money, to satisfy said lien upon the proper records, whereupon the said land shall be freed and discharged from said lien. Such trustee shall first file a bond, to be approved by the court, conditioned for the faithful application of the money to him so paid, as aforesaid, according to the trust and order of court. It shall be the duty of the trustee to invest the said moneys in securities authorized by law.

NOTE.—This is Section 1 of the Act of April 3, 1903, P. L. 151, 3 Purd. 3454, except that the second proviso has been added.

Section 2 of the Act of 1903 is a general repealer. The Act of 1903 applies also to proceedings in the common pleas and is recommended for repeal only so far as relates to the orphans' court.

SECTION 18 (*a*) Should the widow of the decedent be living at the time of the partition and entitled to a life estate in one-half or one-third of the real estate under the intestate laws, or should such widow elect to take against the will of the decedent and thereby be entitled to such life estate, she shall not be entitled to payment of the sum at which her purpart or share of the estate shall be valued, but the same, together with interest thereof, shall be and remain charged upon the premises, if the whole be taken by one person, or upon the respective shares, if divided as hereinbefore mentioned, and the legal interest thereof shall be semi-annually and regularly paid by the persons to whom such real estate shall be adjudged, their heirs or assigns, holding the same, according to their respective portions, to the said widow, during her natural life, in lieu and full satisfaction of her dower at common

law, and the same may be recovered by the widow by distress or otherwise, as rents in this commonwealth are recoverable. On the death of the widow, the said principal sum shall be paid by the persons to whom the said real estate shall have been adjudged, their heirs or assigns, holding the premises, to the persons thereunto legally entitled.

NOTE.—This is Section 41 of the Act of March 29, 1832, 3 Purd. 3433, with the insertion of language to make it apply only to cases of decedents dying before the new Intestate Act goes into operation, and the substitution of "persons" for "child or other descendant."

The section was derived from Section 22 of the Act of April 19, 1794, 3 Sm. L. 143, and Section 6 of the Act of April 7, 1807, P. L. 155. The latter section is printed in the Digests, but since it seems to have been supplied by the Act of 1832, its express repeal is now recommended.

(*b*) When the real estate of any decedent shall consist of several different tracts or pieces of land, and the same shall be adjudged to any of the parties entitled thereto, or ordered to be sold, by any orphans' court, such court shall have authority to decree that the share or purpart of the widow of such decedent in the whole of said real estate, where such widow is entitled to a life interest, together with the interest thereof, shall be and remain charged on one or more of the said tracts or pieces of land, in the manner and for the purposes now provided by law, and that the remaining tracts or pieces of land shall be wholly discharged from the share or purpart of such widow, or any part thereof: *Provided*, That the pieces or tracts of land, upon which such purpart or share shall be so charged as aforesaid, shall, in the opinion of such court, be fully sufficient to secure the payment of the principal and interest of such purpart or share: *And provided further*, That such widow shall have the same remedies for recovery of her interest as are provided in clause (*a*) of this section.

NOTE.—This is Section 1 of the Act of January 7, 1867, P. L. 1367, 3 Purd. 3435, with the insertion of the words, "where such widow is entitled to a life interest," to show that the section will apply only to cases where the decedent has died or shall die before the new Intestate Act goes into effect.

SECTION 19. Should any person other than the widow of the decedent be entitled, under the intestate laws, or should any person, including the widow of the decedent, be entitled under the will of the decedent, to a life interest in an undivided share of the real estate, the share of such tenant for life shall not be paid to him or her, but the same, together with interest thereof, shall be and remain charged upon the premises, if the whole be taken by one person, or upon the respective shares, if divided as hereinbefore mentioned, and the legal interest thereof shall be semi-annually and regularly paid by the persons to whom such real estate shall be adjudged, their heirs or assigns, holding the same, according to their respective portions, to the said tenant for life, during his or her natural life, and the same may be recovered by such life tenant as debts of like nature in this commonwealth are recoverable. On the death of the life tenant, the said principal sum shall be paid by the persons to whom the said real estate shall have been adjudged, their heirs or assigns, holding the premises, to the persons thereunto legally entitled.

NOTE.—This is a new section, making provisions for other undivided life interests similar to those made by Section 18 (*a*) for widows, except that the remedy for collection is made the same as the remedy for recovery of "debts of like nature."

SECTION 20. In case of partition of real estate now or hereafter held by two or more persons as tenants in common, where one or more of said tenants shall have been or shall hereafter be in possession of said real estate, the parties in possession shall have deducted from their distributive shares of said real estate the proportional part

of the rental value thereof to which their co-tenant or co-tenants are entitled for the time such real estate shall have been in possession as aforesaid.

NOTE.—This incorporates so much of Section 1 of the Act of June 24, 1895, P. L. 237, 3 Purd. 3454, as relates to partition. The other part of the section gives a remedy for such rentals by action between co-tenants. The section is recommended for repeal only so far as relates to the orphans' court.

SECTION 21. Upon an appraisement or valuation of real estate made as provided in Section 9 or Section 10 of this act, should all the parties neglect, after due notice, as provided in Section 11 hereof, or refuse to take the same or any part thereof at the valuation, or to bid above the appraisement as provided in Section 12 hereof, the court shall, on the application of any one of the parties, grant a rule upon the other parties interested, to show cause why the estate, or part thereof, so appraised and not taken at the appraisement or bid for, should not be sold; which rule shall be returnable at such time as the court, having respect to the circumstances of the case, may direct; and service of such rule shall be made in the manner provided by law for the service of citations in the orphans' court. On the return of such rule, the court may, on due proof of notice to all persons interested, make a decree authorizing and requiring the executor or administrator, as the case may be, to expose such real estate, or part thereof, to public sale, at such time and place, and on such terms as the court may decree: *Provided*, That the rule to show cause herein directed may be dispensed with by the court, on the application of all the parties in interest, if of full age and sui juris, and of the guardians or committees of such as are weak-minded persons for whom guardians have been appointed, minors, lunatics or habitual drunkards, for such decree; and public notice of such sale shall be given by the person who is to make the sale, once a week for a period of three weeks before the day appointed therefor, by advertisement in

at least one newspaper published in the county, if there be one, or, if there be none, then in an adjoining county; and in all cases, notice shall also be given by handbills, one of which shall be posted at a conspicuous place on the real estate proposed to be sold, and at least three of which shall be posted at three of the most public places in the vicinity of such estate; and in any case the court may, by general rule or special order, require such further notice as it shall deem advisable.

NOTE.—This is Section 42 of the Act of March 29, 1832, 3 Purd. 3438, which was founded on Section 1 of the Act of April 2, 1804, P. L. 459, and Section 2 of the Act of March 26, 1808, P. L. 144, the provision for making the rule returnable later than the next regular session of the court being new in the Act of 1832.

The changes now suggested are to modify the language so as to include cases where there is a division into fewer purparts than parties entitled (now covered by Section 7 of the Act of April 7, 1807, P. L. 155, 3 Purd. 3440), and cases of failure or refusal to take some purparts (now covered by Section 1 of the Act of April 15, 1845, P. L. 458, 3 Purd. 3440); to substitute "parties" for "heirs," in line 3 and other places; to insert the provisions as to lunatics, etc.; to substitute a new provision as to service of the rule; and to add, at the end, provisions for notice of sale similar to those in Section 16 (*g*) of the Fiduciaries Act.

The Act of June 12, 1893, P. L. 461, 3 Purd. 3447, and the amendment of May 23, 1913, P. L. 304, 6 Purd. 7051, relating to sales of real estate for the purpose of distribution on petition of all parties in interest, are covered by Section 23 of the present draft.

SECTION 22. In all cases of the partition or valuation of real estate, the orphans' court may, upon the application of any party in interest, instead of the separate rules herein provided for such cases, grant a rule upon the parties interested to appear, and accept or refuse the said real estate at the valuation, or, in case they or any of them should neglect or refuse to take and accept the same as aforesaid, show cause why the said real estate, or any part thereof, should not be sold.

NOTE.—This is Section 2 of the Act of April 25, 1850, P. L. 569, 3 Purd. 3440, except that "any party in interest" is substituted for "any of the heirs of the decedent" after "the application of the widow," and "herein provided for" is substituted for "heretofore issued in," after "separate rules."

SECTION 23 (*a*) Whenever any person shall die seised of real estate, and the parties in interest desire the same to be converted into money for distribution, it shall be lawful for the orphans' court of the proper county, in its discretion, upon the joint petition of the widow and heirs, or devisees, and the guardians or committees of such as are minors or under disability, in whom the real estate of the decedent shall have vested by descent or will, and legatees whose legacies are charged on said real estate, or the representatives of such as may be deceased or under disability, to order the executor or administrator, or a trustee to be appointed by said court, to make sale of said real estate. Such petition shall set forth the description of the property, the desire to have the same sold, and its estimated value according to the affidavits of two disinterested and competent persons, and said petition shall be duly sworn to. Said order shall provide that, before making sale, the executor, administrator or trustee shall give bond, in double the estimated value of the said real estate, and shall proceed thereafter in all respects in the manner provided by this act in cases of the sale of real estate under proceedings in partition. The proceeds of such sale, after payment of the expenses thereof, shall be distributed to and among those entitled thereto, the same as real estate. Such sale shall have the same effect in all respects as a public sale in proceedings in partition of real estate under this act.

NOTE.—This is Section 1 of the Act of June 12, 1893, P. L. 461, 3 Purd. 3447, as amended by the Act of May 23, 1913, P. L. 304, 6 Purd. 7051, with further changes.

The Act of May 14, 1874, P. L. 166, 1 Purd. 1120, relating to real estate valued at not more than one thousand dollars, is supplied by the Act of 1893 and should be

repealed. The Act of 1874, however, has been followed in the new draft as to the provision that the petition shall set forth the estimated value of the property, and that this estimate shall be supported by the affidavits of disinterested persons.

The Act of 1874 provided that the proceedings should be the same as those in cases of sales for payment of debts. The Commissioners consider that the reference to proceedings in partition is more appropriate.

In the new draft, the words "or devisees" have been inserted in line 6; the words "or under disability" have been inserted in line 11; the words "to be appointed by said court" have been inserted after "trustee" in line 12; and "estimated" has been substituted for "appraised" in line 19. The order of the clauses has also been altered for the sake of clearness.

(*b*) When the lands, in respect to which a petition for sale shall be filed under the provisions of clause (*a*) of this section, shall lie in one or more adjoining tracts in different counties, or shall lie in two or more counties, but not in adjoining tracts, the proceedings shall be in the courts designated in sections 37 and 38 of this act, respectively.

NOTE.—This clause is new.

SECTION 24. Whenever any real estate shall be ordered to be sold under proceedings in partition, the orphans' court is hereby authorized and required, in case of the neglect or refusal of the executor or administrator to execute such order, or in case there be no executor or administrator, or in case the court for any reason deems it advisable, to appoint some suitable person trustee for the purpose of making such sale, who shall be subject to the same restrictions, and have the same powers, and whose proceedings shall have the same effect, to all intents and purposes, as are provided in the case of such sales by executors or administrators.

NOTE.—This is Section 44 of the Act of February 24, 1834, P. L. 81, 3 Purd. 3439, which was not included in the draft prepared by the Commissioners of 1830.

The words "or in case the court for any reason deems it advisable" have been inserted in order to confer upon the court a discretion which, it has been held, does not now exist: Arble's Estate, 161 Pa. 373.

SECTION 25. In all cases where the carrying out of any decree of the court under the provisions of this act shall involve the receipt of money, the court shall direct the person acting under the decree to file a bond to the commonwealth in a sufficient amount conditioned for the proper application of all moneys to be received. Such bond shall inure to the benefit of all persons interested and be executed by two individual sureties or by one corporate surety, approved by the court. No such decree shall be executed until such bond, with sureties as may be required, shall be filed: *Provided*, That where a corporation, duly authorized by law, shall be designated to carry out any such decree, the court may, in lieu of security as aforesaid, permit such corporation to enter its own bond without surety.

NOTE.—This is a copy of Section 16 (*f*) of the Fiduciaries Act. See the note to that section.

SECTION 26. All public or private sales of real estate or of any part or purpart thereof, under the provisions of this act, shall have the effect of judicial sales as to the discharge of liens upon the real estate or part or purpart thereof so sold.

NOTE.—This supplies Section 42 of the Act of February 24, 1834, P. L. 81, 3 Purd. 3439, which extended to sales in partition the provision of Section 21 of the Act of April 19, 1794, 3 Sm. L. 143, as to discharge of real estate from the debts of the decedent.

SECTION 27. In all cases of sales of real estate under the provisions of this act, when the entire purchase money shall not be paid in cash, the purchaser or purchasers shall enter recognizance in the orphans' court, with sufficient security, to be approved by said court, for the payment

of the purchase money, or any balance thereof, over and above the costs and expenses of said proceedings, to the parties who may be entitled to the same. Such recognizance shall be a lien on the real estate so sold until fully paid and satisfied.

NOTE.—This is founded on the last part of Section 1 and Section 2 of the Act of May 23, 1871, P. L. 274, 3 Purd. 3446, substituting "parties" for "widow, heirs or legatees."

Section 2 of the Act of 1871, 3 Purd. 3446, provides that before bringing suit on such recognizance the person entitled to receive the money shall give a refunding bond, and that if he is unable to do so, the money shall be put at interest as directed in Section 41 of the Act of February 24, 1834.

As is noted under Section 47 (*b*) of the Fiduciaries Act, Section 41 of the Act of 1834, as to refunding bonds, has become obsolete and is recommended for repeal. Section 45 of the Act of 1834, relating to the giving of refunding bonds by distributees of the proceeds of real estate sold under order of the orphans' court, is also recommended for repeal. See note to Section 16 (*k*) of the Fiduciaries Act.

Section 2 of the Act of 1871 is, therefore, also recommended for repeal.

SECTION 28. Whenever a public or private sale of real estate shall be directed or confirmed under the provisions of this act, the person or persons purchasing the real estate so sold and taking title thereto in pursuance of the decree of the court, shall take such title free and discharged of any obligation to see to the application of the purchase money.

NOTE.—This is copied from Section 16 (*p*) of the Fiduciaries Act. It supersedes Section 1 of the Act of March 27, 1865, P. L. 45, 3 Purd. 3445, and Section 1 of the Act of April 28, 1868, P. L. 105, 3 Purd. 3445, relating to payment into court of the purchase money on a sale in partition, the former extending to sales in partition the provisions of Section 19 of the Act of February 24, 1834, P. L. 70, 1 Purd. 1122, which related to sales by executors under testamentary powers, and the Act of 1868 providing that the court might, in its discretion,

require payment into court or make such order as might be just in the premises.

As is noted under Section 30 of the Fiduciaries Act, Section 19 of the Act of 1834 was superseded by the Act of June 10, 1911, P. L. 874, 7 Purd. 7703, which relieves purchasers of obligation to see to the application of purchase money, and is the basis of Section 30 of the Fiduciaries Act.

SECTION 29. Where a decree for the sale of real estate shall be made by the orphans' court, in the event provided for in Section 21 hereof, the court shall direct that, if there be a widow entitled to a life interest in such real estate under the intestate laws, or should such widow elect to take against the will and thereby be entitled to such life estate, the share of the widow in the purchase money shall remain in the hands of the purchaser, during the natural life of the widow. The interest thereof shall be semi-annually and regularly paid to her by the purchaser, his heirs and assigns, holding the premises, and may be recovered by distress or otherwise as rents are recoverable in this commonwealth, which the said widow shall accept in full satisfaction of her dower in such premises; and at her decease, her share of the purchase money shall be paid to the persons legally entitled thereto.

NOTE.—This is Section 43 of the Act of March 29, 1832, 3 Purd. 3440, which was founded on Section 5 of the Act of April 14, 1828, P. L. 484.

The only changes now made are to insert in lines 3 and 4, the words "if there be a widow entitled to a life interest in such real estate," instead of the words "if there be one," and to change "annually" to "semi-annually."

SECTION 30. In the case of a sale of real estate under proceedings in partition in the orphans' court, should any person other than the widow of the decedent be entitled, under the intestate laws, or should any person, including the widow of the decedent, be entitled under the will of the decedent to a life interest in an undivided

share of the real estate, the share of such person shall not be paid to him or her, but shall remain charged on such or other real estate, according to the directions of the court; and the legal interest thereof shall be semi-annually and regularly paid by the purchaser of such real estate, his heirs or assigns, holding the same, during the natural life of such life tenant, and the same may be recovered by such life tenant as debts of like nature in this commonwealth are recoverable, and on the death of the life tenant, the said principal sum shall be paid by the person by whom the said real estate shall have been purchased, his heirs or assigns, holding the premises, to the persons thereunto legally entitled.

NOTE.—This includes the first part of Section 46 of the Act of February 24, 1834, P. L. 82, 3 Purd. 3445, which was new in that act. It is now altered to conform to Section 19 of this draft. The remainder of the section relates to sales for the payment of debts, and is covered in the Fiduciaries Act.

SECTION 31. In any case of a sale of real estate under the provisions of this act, instead of the life interest of any person in an undivided share of the real estate remaining charged on the real estate as aforesaid, the court may, on petition of the person entitled to the life interest, or of the purchaser, direct the purchaser to pay such principal sum to a suitable person or corporation, who shall be appointed by the court as trustee to receive and hold such principal sum, invest the same in securities authorized by law, pay the income thereon, after deducting all legal charges, to the person entitled thereto, and, upon the death of such person, to pay over such principal sum to the persons thereunto legally entitled, after deducting all legal charges thereon. Such trustee shall enter such security as the court may direct, and shall not be an insurer of the trust fund, and shall be liable to the persons interested in the income or corpus of the trust fund only for such care, prudence and diligence in the execution of the trust as other trustees are liable for.

NOTE.—This is a new section intended to provide a method of relieving the real estate of the charge of a life interest in an undivided share. Its provisions are founded to some extent on Section 23 of the Fiduciaries Act.

SECTION 32. In all cases where the letters testamentary or of administration shall be revoked, or the executor, administrator or trustee, or one or more of the co-executors, co-administrators or co-trustees, authorized to make a sale of real estate under the provisions of this act, shall be removed by the court, or shall die, or become insane, or otherwise be incapable, before such sale is effected or before a deed of conveyance is made to the purchaser, such sale or such conveyance shall be made in the manner and with the effects as provided by law in other cases of sales by executors, administrators or trustees, under like circumstances.

NOTE.—This is a new section. Repetition of the provisions of Section 16 (*j*) of the Fiduciaries Act seems unnecessary.

Section 47 of the Act of 1832, 3 Purd. 3441, providing for execution of the deed where an executor, administrator or guardian who has made a sale becomes incapable, is removed or dies, applies to all sales under order of the orphans' court. It and the related acts are covered by Section 16 (*j*) of the Fiduciaries Act.

Section 4 of the Act of April 9, 1849, P. L. 525, 3 Purd. 3441, makes similar provisions where a trustee appointed by the court to make a sale in partition is removed, dies or becomes incapable before making conveyance.

SECTION 33. In all cases where, in consequence of proceedings in partition, the share, or any part thereof, of a party in interest, in real estate, shall be converted into money, either by reason of the impracticability or inequality of partition, or by virtue of a sale or otherwise, the orphans' court, before making a final decree confirming the partition or distributing the proceeds of sale, as the case may be, may appoint a suitable person as auditor, to ascertain whether there are any liens or other incumbrances on such real estate, affecting the interests of

the parties. If it shall appear by the report of such auditor or otherwise, that there are such liens, the court may order the amount of money which may be payable to any of the parties against whom liens exist, to be paid into court, and shall have full power to decree the distribution thereof among the creditors or others entitled thereto. Where recognizance or other security shall be given for the payment of money, the court may make an order on the party giving such recognizance or other security, to pay the amount thereof into court, when the same shall become due, to be distributed in like manner among the persons holding liens at the time of the partition.

NOTE.—This is Section 49 of the Act of 1832, 3 Purd. 3442, which was new in that act.

The changes now made are to substitute "a party in interest" for "an heir" in line 3; the words from "distributing" to "may be," for "sale as aforesaid" in line 7; "full power to decree" for "the like power as to" in line 15; and "entitled thereto" for "as is now exercised by the courts of common law, where money is paid into court by sheriffs or coroners," in line 17.

Section 45 of the Act of February 24, 1834, P. L. 82, 1 Purd. 1122, relating to the giving of refunding bonds by distributees of the proceeds of real estate, applies to all sales under order of the orphans' court, including partition. In a note to Section 16 (*k*) of the Fiduciaries Act, the above section is recommended for repeal. There seems to be no reason for re-enacting it as to partition sales only.

Section 48 of the Act of 1832, 3 Purd. 3444, and Section 1 of the Act of April 13, 1869, P. L. 28, 3 Purd. 3446, relating to payment to a husband of money awarded to his wife in partition proceedings, would seem to be obsolete since the Married Women's Acts and the act abolishing separate acknowledgments. Their repeal is therefore recommended.

SECTION 34. Upon the sale of any real estate by an executor, administrator or trustee, in proceedings in partition in the orphans' court, it shall be the duty of the said executor, administrator or trustee to file in the orphans' court of the proper county an account of the proceeds of such sale.

NOTE.—This is Section 1 of the Act of April 11, 1863, P. L. 341, 3 Purd. 3445, altered by inserting "executor" in lines 2 and 4, by changing "after" to "in" in line 2, by substituting "orphans' court" for "office of the register," and by substituting "the proceeds of such sale" for "his said administration or trusteeship," and omitting, at the end, "in the same manner as is required by law in the settlement of estates of decedents."

SECTION 35 (*a*) The costs in all cases of partition in the orphans' court, with a reasonable allowance to the petitioners for counsel fees, to be taxed by the court, or under its direction, shall be paid by all the parties, in proportion to their several interests.

NOTE.—This is Section 1 of the Act of April 27, 1864, P. L. 641, 3 Purd. 3455, so far as it relates to the orphans' court. The act is not to be repealed so far as it relates to the common pleas.

Section 36 of the Act of March 29, 1832, 3 Purd. 3423, provides that the orphans' court shall have power "to give judgment * * * that the costs thereof be paid by the parties concerned." This seems to have been supplied by the Act of 1864, and is now recommended for repeal.

(*b*) In all cases of sales of real estate, under the provisions of this act, it shall be lawful for the court to order and decree that the costs and expenses of said proceedings, including a reasonable compensation to the executor, administrator or trustee by whom said sale shall be made, shall be paid, on the confirmation of such sale, out of the proceeds thereof.

NOTE.—This is the first part of Section 1 of the Act of May 23, 1871, P. L. 274, 3 Purd. 3446, with slight changes in phraseology, and the substitution of "out of the proceeds thereof" for "by the court," at the end. In line 2, the words, "and may" are omitted after "shall."

SECTION 36 (*a*) When any orphans' court having jurisdiction of any proceedings in the partition of real estate shall order, or has ordered, any such real estate or

any purparts thereof to be sold, said court may authorize or direct a private sale thereof, or may approve, ratify and confirm a private sale thereof made under an order for a public sale, if in the opinion of the court, under all the circumstances, a better price can be obtained at a private sale than at a public sale thereof.

NOTE.—This is Section 1 of the Act of May 22, 1895, P. L. 114, 3 Purd. 3454, limited to the orphans' court. So far as it relates to the common pleas, the repeal of that section is not recommended.

In lines 4 and 5, "authorize or direct" is substituted for "decree and approve." The provision for security is omitted, being covered by Section 25 of this draft.

(*b*) Before authorizing or directing any private sale of real estate under this act, public notice thereof shall be given by advertisement printed in at least one newspaper, published in the county where such real estate is situated, and in such other papers as may be designated by the court, once a week for a period of three weeks prior to the date fixed by such order for authorizing or confirming such sale, and also written or printed notices, one of which shall be posted at a conspicuous place on the real estate proposed to be sold, and at least three of which shall be posted at three of the most public places in the vicinity of such real estate. Before authorizing or directing such sale, the court shall require proof, by affidavit to be filed in the proceeding, that notice as aforesaid has been given. Such notice shall specify the location and description of the real estate proposed to be sold, the name of the proposed purchaser and the price agreed to be paid.

NOTE.—This is copied from Section 16 (*m*) 2 of the Fiduciaries Act.

(*c*) On the day fixed by such order and notice for authorizing or directing such private sale, any party interested as heir, devisee or intending purchaser, or any legatee whose legacy is, by the express terms of the will, or by law, charged on such real estate, may appear

and object to such private sale on account of the insufficiency of the price, and, if such objection be sustained, may offer to give or pay a substantial increase for such property. The court, at its discretion, may thereupon authorize or direct such sale, or refuse to authorize or direct the same, and accept any substantially increased offer, and may authorize the sale of such property to such new bidder upon compliance with the conditions of sale and giving such security as shall be directed by the court. Such party interested or legatee may appear as aforesaid and object to such sale on any legal or equitable grounds. Nothing herein contained shall be construed to affect the existing law with respect to objections to public sales.

NOTE.—This is copied, with slight modification, from Section 16 (*m*) 3 of the Fiduciaries Act.

SECTION 37. When the lands, in respect to which application for partition shall be made to the orphans' court as aforesaid, lie in one or more adjoining tracts, in different counties, it shall be lawful for the orphans' court of the county in which the mansion house is situated, or, if there be no mansion house, the court of the county where the principal improvements may be, or, if there be no improvements, the court of either county, on the application of any person interested, either to proceed by the appointment of commissioners as aforesaid, or to issue its writ to the sheriff of the county within the jurisdiction of the court, specifying the lands of which a partition or valuation is to be made. Thereupon the said sheriff shall summon an inquest to divide or value the said lands, in the same manner as if the whole were within his proper bailiwick. Upon the return thereof, or upon the return of the commissioners appointed by the court, as aforesaid, the court may further proceed therein, in all respects as if all the said lands were in the county. Any recognizance taken in pursuance of such proceedings shall be as effectual, to all intents and purposes, as if the lands bound by it were wholly within the county

where such recognizance is taken. A certified copy of the proceedings which may be had shall, within twenty days after the final decree therein, be delivered to the clerk of the orphans' court of each county in which the application shall not have been made, and in which any part of the said lands are situate, which shall be entered on the records of such court at the joint expense of all parties concerned.

NOTE.—This is Section 44 of the Act of March 29, 1832, 3 Purd. 3447, which was founded on Section 1 of the Act of April 1, 1805, P. L. 205. It is now altered by inserting the provisions as to the mansion house, improvements, etc., as used in the Fiduciaries Act. In the proviso, "certified copy" is substituted for "exemplification."

SECTION 38 (*a*) All proceedings for the partition or valuation of real estate, under the provisions of this act, where the real estate to be divided or valued is situate in two or more counties of this commonwealth, but not in adjoining tracts, shall be brought only in the county where the decedent, whose land is to be divided or valued, had his domicile, or if he had no domicile in the state, then in the county where the larger part of the estate in value shall be situated; or, with leave of such court, the parties interested may institute proceedings in the orphans' court in each county where such real estate is situated.

NOTE.—This is founded on Section 1 of the Act of February 20, 1854, P. L. 89, 3 Purd. 3447, so far as the same relates to the orphans' court, and Section 1 of the Act of April 17, 1856, P. L. 386, 3 Purd. 3448, construing the former.

The Act of 1854 includes the common pleas and is not to be repealed in that regard.

After "real estate" in line 2, the words "the recovery of dower or the widow's third or other part" have been omitted as unnecessary, the widow's remedy in the orphans' court being now by partition proceedings. The word "recovered" is omitted after "valued" in two places, for the same reason. The words "if he had no

domicile in this state, then" have been substituted for "the homestead;" and after "shall be situated" the words "or any defendant may be found" are omitted. The last clause is substituted for the provisions of the Act of 1856, which are unnecessarily obscure but which mean the same as the substituted clause.

Section 2 of the Act of May 14, 1874, P. L. 156, 3 Purd. 3449, supplemental to the Act of 1854, provides that "Nothing contained in this act or the acts to which it is a supplement, shall be so construed as to prevent any tenant in common or joint-tenant of real estate, situated in two or more counties of this commonwealth, from bringing a separate suit, either at law or in equity, in either or any of such counties, for partition or valuation of so much of such real estate as is situated therein, except in the case where such real estate consists of single tracts lying in adjoining counties." This is recommended for repeal, so far as it relates to the orphans' court.

(*b*) In proceedings under this section, all process, writs and notices required to be served personally upon any person or persons interested in such proceedings may be served by the sheriff of any county of this state under deputization from the sheriff of the county in which such proceedings have been instituted or commenced.

NOTE.—This is taken from Section 1 of the Act of April 17, 1856, P. L. 386, 3 Purd. 3448, with the addition of the provision for service in any county of the commonwealth.

Section 1 of the Act of February 20, 1854, P. L. 89, 3 Purd. 3447, provides that "service of process may be made by any sheriff, where real estate to be divided shall be situated, or any defendant may be found."

(*c*) The commissioners or jurors for making partition or valuation under the provisions of this section may be selected from the county in which such proceedings are instituted, or from any one or more of the counties in which such land is situate. The compensation and mileage of said commissioners or jurors shall be the same as is provided in Section 7 of this act.

NOTE.—This is derived from Sections 1 and 2 of the Act of April 17, 1856, P. L. 386, 3 Purd. 3448. That act specially provides for the sheriff's fees and the jurors' fees and mileage. Commissioners are now included, provision is made that the commissioners or jurors may be selected from any one or more of the counties instead of only from the county where the proceedings are instituted, and reference is made to Section 7 of this draft for the provisions as to their compensation and mileage. The provision that the sheriff shall receive two dollars a day for each day after the first, is omitted, since it is properly covered by the sheriff's fee bills.

(*d*) This section shall include all proceedings in partition necessary to be had, as well before as after the refusal of the parties to take real estate at the valuation; and the said courts in which such proceedings are had, are hereby authorized to order the sale of such real estate, after such refusal, in the same manner as if all the real estate were situated in the county in which such proceedings are instituted: *Provided*, That the sales of such real estate shall be held in the county in which the real estate is situated, unless otherwise ordered by the said courts.

NOTE.—This is part of Section 1 of the Act of March 30, 1869, P. L. 15, 3 Purd. 3448, supplemental to the Act of 1854.

(*e*) Except as otherwise provided by this section, the proceedings hereunder shall be the same as provided by this act in other cases of partition and valuation.

NOTE.—This is taken from the last clause of Section 1 of the Act of May 14, 1874, P. L. 156, 3 Purd. 3449.

(*f*) Certified copies of the record may be filed in every county where such real estate shall be situated, in the office of the clerk of the orphans' court thereof, and be received in evidence, with the like effect, as the records of the court where filed.

NOTE.—This is taken from the last part of Section 1 of the Act of February 20, 1854, P. L. 89, 3 Purd. 3447, substituting "certified copies" for "exemplifications."

SECTION 39 (*a*) In all cases of partition in the orphans' court, where the court shall order and decree any party taking any portion of the estate at a bid or at the appraisement, or purchasing the same at a sale, as hereinbefore provided, to give any recognizance for the payment of any part of bid, valuation or purchase price, the court shall have power to appoint an auditor for the purpose of ascertaining advancements and making distribution among the heirs and parties in interest. In all cases in which such auditor has not been or may not be appointed, it shall be the duty of the court to make a calculation exhibiting the amounts due the respective parties in interest, and to direct the clerk of the court to record said calculation upon the partition docket of the court as a part of the proceedings in each case, for which services the clerk shall be entitled to a fee of one dollar.

NOTE.—This is Section 1 of the Act of April 12, 1855, P. L. 214, 3 Purd. 3436, modified so as to authorize the court to appoint an auditor, and to provide that the court, instead of the clerk, shall make the calculation and that it shall be recorded in the partition docket.

(*b*) 1. Where a recognizance has been or shall hereafter be taken in any orphans' court, in any partition proceeding, as hereinbefore provided for, and the same, or any part thereof, shall be satisfied or paid to the person or persons interested therein, his, her or their agent or attorneys, any such person so having received satisfaction of the amount coming to him, shall enter an acknowledgment thereof upon the record of such court, which shall be satisfaction and discharge of the said recognizance, to the amount acknowledged to be paid; and the recognizance shall cease to be a lien on the real estate of the conusor to a greater amount than the principal and interest actually remaining due.

NOTE.—This is Section 50 of the Act of March 29 1832, 3 Purd. 3435, which was derived from the first clause of Section 6 of the Act of April 14, 1828, P. L. 484, but omitted all reference to bonds as distinguished from recognizances. It is now made applicable to all cases

of recognizance in partition, and not merely to cases of acceptance at the appraisement.

2. If any person who shall have received satisfaction as aforesaid, for his claim or lien secured by such recognizance, shall neglect or refuse to enter upon the record his acknowledgment thereof, upon the written request of the owner of the premises, bound by such recognizance, or of any part thereof, or of his legal representatives, or other persons interested therein, on tender of all the costs for entering such acknowledgment, the orphans' court, on due proof to them made that the entire amount due to any heir, legatee or distributee, shall have been fully paid and discharged, may make an order for the relief of such person from any recognizance or other recorded lien. Such order, being certified to the proper court where such lien may appear, shall be entered on the records, and shall inure and be received as a full satisfaction and discharge of the same.

NOTE.—This is Section 51 of the Act of March 29, 1832, 3 Purd. 3436, which was founded on part of Section 6 of the Act of April 14, 1828, P. L. 484. The Commissioners' Draft did not contain the provision as to action by the orphans' court.

The provision for a penalty of fifty dollars and damages to be assessed by a jury on a trial at law is now omitted, the remedy in the orphans' court being considered sufficient.

Sections 22 and 23 of the Act of April 26, 1850, P. L. 581, 3 Purd. 3436, so far as they relate to such recognizances, are recommended for repeal. Those sections extend to legacies and recognizances the provisions of the Act of March 31, 1823, P. L. 216, 1 Purd. 1187, relating to satisfaction of mortgages. The incorporation of those provisions in the present draft by mere reference would raise a question of constitutionality and there seems to be no need for doing so.

SECTION 40. In all cases arising under this act, where there is a limitation of an estate or interest in the premises or some part thereof to a person or persons not in existence, the court shall have power to appoint a trustee to repre-

sent such unborn person or persons in the proceedings, and shall have power to make such further or other orders in regard to the property or purpart in which such person or persons may become interested, or the proceeds of the sale thereof, or any recognizance given with respect thereto, as justice and equity may require.

NOTE.—This is founded on the second proviso to Section 1 of the Act of June 3, 1840, P. L. 593, 3 Purd. 3412, which relates only to "writs of partition," as construed in Holmes *vs.* Woods, 168 Pa. 530.

SECTION 41. It shall be the duty of the clerks of the orphans' courts of the several counties of this commonwealth, and they are hereby required to enter in a book to be procured for that purpose, to be called a partition docket, all the proceedings in partition in every case in their respective courts, from the commencement to the final judgment and decree thereon, which shall be and the same is hereby made the record of said court; for which service, such clerks shall be entitled to receive the same fees as the recorders of deeds receive for recording, to be taxed and paid as part of the costs of such proceedings.

NOTE.—This is Section 1 of the Act of April 4, 1889, P. L. 23, 3 Purd. 3436.

SECTION 42. It shall be the duty of the clerks of the orphans' courts of the several counties of this commonwealth, and they are hereby required, to keep a separate index, to be known as the partition index, in which shall be entered in alphabetical order the names of all persons to whom any real estate shall be allotted or awarded in partition proceedings in said courts, and the names of all purchasers of real estate in such proceedings.

NOTE.—This is a new section, introduced in order to facilitate searches of title. In the absence of such index, it is often very difficult to trace back a title to a partition proceeding, since the records of the orphans' court show the proceeding only under the name of the decedent.

SECTION 43. Any party aggrieved by any definitive decree or judgment of any orphans' court, or by any order or decree awarding or refusing to award an inquest, or by an order of sale, under the provisions of this act, may appeal therefrom to the proper appellate court as in other cases of appeals from the orphans' court.

NOTE.—This is a new section, intended to permit an appeal from an order awarding an inquest, which has been held to be an interlocutory order from which an appeal does not lie: Wistar's Appeal, 115 Pa. 241; Gesell's Appeal, 84 Pa. 238; Christy's Appeal, 110 Pa. 538, and from an order of sale in partition, which has also been held to be interlocutory; see Robinson's Appeal, 62 Pa. 213; Robinson *vs.* Glancy, 69 Pa. 89; Snodgrass' Appeal, 96 Pa. 420.

Where questions of the right of partition, involving, for example, adverse claims of title, or the construction of a will, are determined in awarding the inquest it seems that it should be possible to have this decision reviewed without waiting until after the allotment of purparts or confirmation of a sale.

Section 15 of the Act of April 5, 1842, P. L. 236, 2 Purd. 1434, permits a writ of error to a judgment *quod partitio fiat* in actions of partition at law. There seems to be no reason why a similar allowance should not be made in partition in the orphans' court.

SECTION 44. This act shall be known and may be cited as the Orphans' Court Partition Act of 1917.

SECTION 45. The following acts and parts of acts of assembly are repealed as respectively indicated. The repeal of the first section of an act shall not repeal the enacting clause.

Section 22 of an act entitled "An Act directing the descent of intestates' real estates, and distribution of their personal estates, and for other purposes therein mentioned," passed April 19, 1794, 3 Sm. L. 143, absolutely.

Section 8 of an act entitled "An Act supplementary to the act entitled 'An Act directing the descent of intestates real estates, and distribution of their personal estates, and for other purposes therein mentioned,'"

passed April 4, 1797, 3 Sm. L. 296, in so far as it relates to the orphans' court.

An act entitled "A further supplement to the act entitled 'An Act directing the descent of intestates real estates and distribution of their personal estates, and for other purposes therein mentioned,'" approved April 2, 1804, P. L. 459, absolutely.

An act entitled "A further supplement to an act, entitled 'An Act directing the descents of intestates real estates and distribution of their personal estates, and for other purposes therein mentioned,'" approved April 1, 1805, P. L. 205, absolutely.

Sections 6, 7 and 8 of an act entitled "An Act supplementary to the several acts of this commonwealth concerning partitions, and for other purposes therein mentioned," approved April 7, 1807, P. L. 155, absolutely, and section 9 of said act in so far as it relates to the orphans' court.

Section 2 of an act entitled "An Act to amend certain parts of an act, entitled 'An Act supplementary to the several acts of this commonwealth, concerning partitions and for other purposes therein mentioned,'" approved March 26, 1808, P. L. 144, absolutely.

Sections 5 and 6 of an act entitled "A supplement to the act, entitled 'A further supplement to the act, entitled an act to alter the judiciary system of this commonwealth,' passed the eighth day of April, eighteen hundred and twenty-six," approved April 14, 1828, P. L. 484, absolutely.

Sections 36 to 46 inclusive, and 48 to 51 inclusive, of an act entitled "An Act relating to orphans' courts," approved March 29, 1832, P. L. 190, absolutely.

Sections 42, 44, 45 and 46 of an act entitled "An Act relating to executors and administrators," approved February 24, 1834, P. L. 73, absolutely.

Section 2 of an act entitled "Supplement to the act passed the twenty-ninth day of March, Anno Domini, one thousand eight hundred and thirty-two, entitled 'An Act relating to orphans' courts,'" approved April 14, 1835, P. L. 275, absolutely.

Section 4 of an act entitled "A further supplement to an act, entitled an act relating to orphans' courts, passed the twenty-ninth day of March, one thousand eight hundred and thirty-two, and the supplement thereto, passed the fourteenth of April, one thousand eight hundred and thirty-five, and for other purposes," approved April 13, 1840, P. L. 319, absolutely.

Section 8 of an act entitled "An Act to incorporate the Butler County Mutual Insurance Company, and for other purposes," approved April 24, 1843, P. L. 359, absolutely.

An act entitled "An Act supplementary to the acts relating to orphans' courts," approved April 6, 1844, P. L. 214, absolutely.

Section 1 of an act entitled "A supplement to the act of assembly, passed the twenty-ninth March, one thousand eight hundred and thirty-two, relating to the proceedings in the orphans' court of this commonwealth, and for other purposes," approved April 15, 1845, P. L. 458, absolutely.

Section 1 of an act entitled "An Act in relation to partitions," approved April 21, 1846, P. L. 426, absolutely.

An act entitled "An Act relative to the orphans' court," approved March 13, 1847, P. L. 319, absolutely.

Section 4 of an act entitled "A supplement to an act relative to the venders of mineral waters; and an act relative to the Washington Coal Company; to sheriffs' sales of real estate; to the substitution of executors and trustees when plaintiffs; to partition in the courts of common pleas, and for other purposes," approved April 9, 1849, P. L. 524, except in so far as it relates to sales made before its date.

Section 10 of an act entitled "An Act to enable Thomas Hoge to make a fee simple title; to enable the trustees under the wills of Ephraim Clark and Catharine Yohe, Alex. Calder, administrator, Joseph B. Baker, guardian, and Nancy, John, and William Kline to sell certain real estate; relative to a school house in Elizabeth township, Lancaster county; to amend the charter of the Second Jackson beneficial society of Philadelphia, and to extend the jurisdiction of the orphans' court," approved April 10,

1849, P. L. 591, except in so far as it validates partition proceedings begun before its date.

Section 2 of an act entitled "An Act relating to the bail of executrixes; to partition in the orphans' court and common pleas; to colored convicts in Philadelphia; to the limitation of actions against corporations; to actions enforcing the payment of ground rent; to trustees of married women; to appeals from awards of arbitrators by corporations; to hawkers and pedlers in the counties of Butler and Union; to the payment of costs in actions by informers in certain cases; to taxing lands situate in different townships; and in relation to fees of county treasurers of Lycoming, Clinton and Schuylkill; to provide for recording the accounts of executors, administrators, guardians and auditors' reports; and to amend and alter existing laws relative to the administration of justice in this commonwealth," became a law April 25, 1850, by reason of the Governor's failure to return it within ten days, P. L. 569, absolutely, and Section 10 of the same act in so far as it relates to the orphans' court.

Sections 22 and 23 of an act entitled "An Act to incorporate the Wyoming County Mutual Insurance Company; relating to Library Street, in the city of Philadelphia; giving jurisdiction to the court of common pleas in Tioga County, in a certain divorce case; and relating to paving in front of the prison in the county of Philadelphia," approved April 26, 1850, P. L. 577, in so far as they relate to recognizances in partition.

Section 1 of an act entitled "An Act relative to suits in dower and partition," approved February 20, 1854, P. L. 89, in so far as it relates to the orphans' court.

An act entitled "A further supplement to the act, entitled 'An Act relating to orphans' courts,' passed the twenty-ninth day of March, one thousand eight hundred and thirty-two," approved April 12, 1855, P. L. 214, absolutely.

Section 4 of an act entitled "An Act to amend certain defects of the law for the more just and safe transmission and secure enjoyment of real and personal estate," approved April 27, 1855, P. L. 368, in so far as it relates to the orphans' court.

Sections 1 and 2 of an act entitled "A supplement to an act relative to suits in dower and partition, passed twentieth February, one thousand eight hundred and fifty-four," approved April 17, 1856, P. L. 386, absolutely.

Section 10 of an act entitled "An Act for the greater certainty of title and more secure enjoyments of real estate," approved April 22, 1856, P. L. 532, in so far as it relates to the orphans' court.

An act entitled "An Act requiring administrators and trustees, upon the sale of real estate, after proceedings in partition, to file, in the register's office of the proper county, an account of their said administration, or trusteeship," approved April 11, 1863, P. L. 341, absolutely.

An act entitled "An Act relative to costs in cases of partition," approved April 27, 1864, P. L. 641, in so far as it relates to the orphans' court.

An act entitled "An Act relating to the committees of the estates of lunatics and habitual drunkards," approved March 22, 1865, P. L. 31, in so far as it relates to the orphans' court.

An act entitled "An Act relating to proceedings in partition," approved March 27, 1865, P. L. 45, absolutely.

An act entitled "A supplement to an act relating to orphans' courts, approved the twenty-ninth day of March, Anno Domini one thousand eight hundred and thirty-two," approved January 7, 1867, P. L. 1367, absolutely.

An act entitled "An Act to extend the jurisdiction of the orphans' court of York and Fayette Counties," approved February 13, 1867, P. L. 160, absolutely.

An act entitled "An Act to repeal a portion of an act, entitled 'An Act relating to proceedings in partition,' approved the twenty-seventh day of March, Anno Domini one thousand eight hundred and sixty-five," approved April 28, 1868, P. L. 105, absolutely.

An act entitled "A supplement to an act, entitled 'An Act relative to the orphans' court,' approved the thirteenth day of March, one thousand eight hundred and forty-seven, confirming certain partitions," approved

February 26, 1869, P. L. 4, except in so far as it confirms partitions made before its date.

An act entitled "A further supplement to an act, entitled 'An Act relative to suits in dower and partition,' approved the twentieth day of February, Anno Domini one thousand eight hundred and fifty-four, and its supplement, approved the seventeenth day of April, Anno Domini one thousand eight hundred and fifty-six," approved March 30, 1869, P. L. 15, in so far as it relates to the orphans' court.

An act entitled "A supplement to the act relating to orphans' courts, approved the twenty-ninth day of March, Anno Domini one thousand eight hundred and thirty-two," approved April 13, 1869, P. L. 28, except in so far as it relates to declarations theretofore made by married women.

Section 2 of an act entitled "An act relating to dowers," approved April 20, 1869, P. L. 77, absolutely.

An act entitled "A further supplement to an act relating to orphans' court, approved the twenty-ninth day of March, one thousand eight hundred and thirty-two, regulating the sale of real estate by executors, administrators or trustees," approved May 23, 1871, P. L. 274, absolutely.

An act entitled "A further supplement to an act relative to suits in dower and partition, approved the twentieth day of February, Anno Domini one thousand eight hundred and fifty-four, and its supplement, approved the thirtieth day of March, Anno Domini one thousand eight hundred and sixty-nine, construing said act and extending jurisdiction of the courts therein," approved May 14, 1874, P. L. 156, in so far as it relates to the orphans' court.

An act entitled "An Act relating to the estates of decedents," approved May 14, 1874, P. L. 166, absolutely.

An act entitled "An act enlarging the powers of the orphans' court in regard to fixing the time for the payment of owelty," approved May 8, 1876, P. L. 140, absolutely.

An act entitled "An act relating to partition of real estate," approved May 1, 1879, P. L. 40, in so far as it relates to the orphans' court.

An act entitled "An act to provide for the keeping of a partition docket by the several clerks of the orphans' courts," approved April 4, 1889, P. L. 23, absolutely.

An act entitled "An act to enlarge the jurisdiction of the orphans' courts in cases of testacy," approved May 9, 1889, P. L. 146, absolutely.

An act entitled "An Act relating to sale of the real estate of decedents," approved June 12, 1893, P. L. 461, absolutely.

An act entitled "An Act relating to the partition of real estate, empowering the courts having jurisdiction to decree and approve and to approve, ratify and confirm private sales," approved May 22, 1895, P. L. 114, in so far as it relates to the orphans' court.

An act entitled "An Act to provide for the liability of tenants in common in possession to their co-tenants out of possession," approved June 24, 1895, P. L. 237, in so far as it relates to the orphans' court.

An act entitled "An Act relating to proceedings in partition and other actions, and for the appointment of committees, ad litem, therein when any of the defendants are lunatic," approved June 26, 1895, P. L. 381, in so far as it relates to the orphans' court.

An act entitled "An Act amending an act, entitled 'An act relating to proceedings in partition and other actions, and for the appointment of committees, ad litem, therein when any of the defendants are lunatic or persons of weak mind,' approved the twenty-sixth day of June, one thousand eight hundred and ninety-five, so as to extend the same to proceedings in the orphans' court and to enlarge the powers of said committees," approved June 10, 1901, P. L. 553, in so far as it relates to the orphans' court.

An act entitled "An Act relating to partition of real estate, and the appointment of a trustee to satisfy liens and to invest the moneys coming into his hands by pro-

ceeding in partition," approved April 3, 1903, P. L. 151, in so far as it relates to the orphans' court.

An act entitled "A supplement to an act, entitled 'An act for the greater certainty of title and more secure enjoyment of real estate,' approved the twenty-second day of April, one thousand eight hundred and fifty-six; so as to authorize a widow to accept real estate in partition, or compete in bidding therefor, and regulating and establishing a mode of payment therefor by the widow," approved June 1, 1907, P. L. 364, in so far as it relates to the orphans' court.

An act entitled "An act to amend an act, entitled 'A supplement to an act, entitled "An act for the greater certainty of title and more secure enjoyment of real estate," approved twenty-second day of April, Anno Domini eighteen hundred and fifty-six; so as to authorize a widow to accept real estate in partition, or compete in bidding therefor, and regulating and establishing a mode of payment therefor by the widow,' approved the first day of June, Anno Domini nineteen hundred and seven; by providing the method by which the dower interests of the widow, and the principal of the dower fund, should be secured in certain cases," approved May 8, 1909, P. L. 489, in so far as it relates to the orphans' court.

An act entitled "An Act to amend the act, approved the twelfth day of June, Anno Domini one thousand eight hundred ninety-three, entitled 'An act relating to sale of the real estate of decedents,'" approved May 23, 1913, P. L. 304, absolutely.

An act entitled "An Act to amend section three of an act, approved the fourteenth day of May, Anno Domini one thousand eight hundred seventy-four, entitled 'A further supplement to an act relative to suits in dower and partition, approved the twentieth day of February, Anno Domini one thousand eight hundred and fifty-four, and its supplement, approved the thirtieth day of March, Anno Domini one thousand eight hundred and sixty-nine, construing said act and extending jurisdiction of the

courts therein,' by extending the provisions thereof to include persons having an undivided interest in the land, or in the coal or timber thereon, when the same has not been entirely severed, and permitting such persons to compel partition of the entire tract," approved May 6, 1915, P. L. 269, in so far as it relates to the orphans' court.

All other acts of assembly, or parts thereof, that are in any way in conflict or inconsistent with this act, or any part thereof, are hereby repealed.

REVISED PRICE ACT.

TABLE OF CONTENTS.

PAGE

SECTION 1. What relief may be granted 338

SECTION 2. Cases in which court may grant relief 341

SECTION 3. Existing laws authorizing sales of real estate, and existing powers to do any acts enumerated in section 1, not impaired 344

SECTION 4. Petition, citation and notice 344

SECTION 5. Who shall execute decrees 345

SECTION 6. Appointment of trustee to make sale and invest proceeds where minors have remainder interests 346

SECTION 7. Effects of decree 346

SECTION 8. Title transferred 347

SECTION 9. Payment or foreclosure of mortgage 347

SECTION 10. Purchase or mortgage money, etc., how held and applied; maintenance and education of minors 348

SECTION 11. Application of moneys to payment of liens or improvement of real estate 349

SECTION 12. Appointment of master to report on expediency of granting application 349

SECTION 13. Bond of person or corporation carrying out decree 350

SECTION 14. Notices of public sales 351

SECTION 15. Securing unpaid purchase money by mortgage 351

SECTION 16. Acknowledgment of deeds, mortgages and leases 351

SECTION 17. Effect of death, removal, disqualification, or irregularity in appointment of fiduciary designated to carry out decree 352

(*a*) Where only one fiduciary; conveyance or mortgage ... 352

(*b*) Where joint fiduciaries; conveyance or mortgage 353

(*c*) Where sale has not been effected 353

(*d*) Effect of sale, conveyance or mortgage 354

PAGE

(*e*) Title of purchaser or mortgagee not affected by revocation of letters or removal of fiduciary after sale or mortgage made 354
(*f*) Irregularity or defect in original appointment of fiduciary not to affect title of purchaser or mortgagee ... 354

SECTION 18. Sale or mortgage to the fiduciary 355

SECTION 19. Real estate in the same or different counties 355
(*a*) Where real estate wholly in one county 355
(*b*) Where real estate divided by county line 355

SECTION 20. Private sales 356
(*a*) Power to authorize or direct 356
(*b*) Objections to sales 356

SECTION 21. Return and confirmation of sales 357

SECTION 22. Discharge of liens 357

SECTION 23. No obligation to see to application of purchase money .. 357

SECTION 24. Appeals 358

SECTION 25. Short title section 358

SECTION 26. Repealer 358

AN ACT

Relating to the jurisdiction, powers and procedure of the orphans' court and the court of common pleas as to sales, mortgages, conveyances on ground rent, leases, extinguishment of ground rents, partition, exchange, squaring and adjusting of lines between adjoining owners, consolidation and combination of mining lands and the leasing thereof, the joining by owners of undivided interests in making and taking conveyances in order to change the route or location of any right of way or passage over adjoining or other lands, and the subdivision of premises so as to command the highest price or greatest rents, and, for such purpose, the laying out or dedication of roads, streets, and alleys or the vacation of such as have not been accepted by the public authorities, where the court shall be of opinion that such decree will be to the interest and advantage of all those interested, and where the legal title is held by minors, lunatics, habitual drunkards or weak-minded persons, a married person whose spouse is a lunatic or has abandoned him or her for one year or has been absent and unheard of for seven years, by corporations having no capacity to convey or by any unincorporated association, by any religious, beneficial or charitable society or association incorporated or unincorporated, and the title is subject to forfeiture if real estate is held in excess of the amount prescribed by its charter or by law, by a corporation or individual or individuals and is subject to a trust of any description whatever, by any person as to whom a presumption of death may have arisen, or any interest wherein is held by any person under legal disability to dispose thereof; where the legal title is an estate tail or is subject to the lien of debts of a decedent not of record, contingent remainders, executory devises, or remainders to a class, some or all of whom may not be in being or ascertained; where estates shall have been devised or granted for special or limited

purposes, where there is a power of sale but the time may not have arrived for its exercise, any preliminary act may not have been done to bring it into exercise, the time limited for its exercise may have expired, or any one or more persons required to consent or join in its exercise may be non compos mentis, have removed out of the state, have died, refuse to act, unreasonably withhold consent or be absent and unheard of; where there has been or shall be a defective appointment in any deed or will and the necessary power is not given to the executor, devisee or appointee to make sale and conveyance; where a trust has been created and no power conferred on the trustee to do any of the acts which the court is hereby empowered to authorize or confirm; and to the effects of such decrees.

NOTE.—This Act is, in substance, a revision of the Price Act of April 18, 1853, P. L. 503, with its supplements. The Commissioners acknowledge their indebtedness to Roland R. Foulke, Esq., of the Philadelphia Bar, for valuable assistance in the drafting of the Act.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That the orphans' court, in all cases where real estate, or a ground rent issuing thereout,[1] shall be or shall have been acquired by descent or last will, partly by deed and partly by descent or last will,[2] or by purchase[3] by a trustee, executor or guardian, and in all other cases the court of common pleas of each county of this commonwealth, shall have jurisdiction with respect to real estate situate within the county, and, in the cases hereinafter specified, to authorize[4] or confirm[5]:—

(*a*) The sale, mortgaging, conveying on ground rent, and leasing thereof, or the extinguishment or assignment of ground rents issuing thereout;[6]

(*b*) The amicable partition and exchange thereof;[7]

(*c*) The squaring and adjusting of lines between adjoining owners;[8]

(*d*) The consolidation and combination of mining lands with other adjoining mining lands, so that they shall form one tract, and the leasing thereof in such manner that the several persons interested therein shall be seised of undivided interests in the whole, proportionate to their several undivided interests before such combination and consolidation, the rents or royalties received under the lease to be apportioned among them in like proportions;[9]

(*e*) The joining by owners of undivided interests in making and taking conveyances, in order to change in part or in whole the route or location of any right of way or passage existing over and upon adjoining or other lands;[10]

(*f*) The subdivision of the premises so as to command the highest price or greatest rents, and for such purpose, where the premises shall admit of or require it, the laying out and dedication of roads, streets and alleys, or the vacating of such as shall not have been paid for or received into actual use by the public, if found to be inconvenient and to make an unprofitable division of the property:[11]

Provided, That such court shall be of the opinion that such decree will be to the interest and advantage of all those interested therein and without prejudice to any trust, charity or purpose for which the real estate or ground rent shall be held and without the violation of any law which may confer an immunity or exemption from sale or alienation.

NOTE.—This is derived from Section 1 of the Price Act, 4 Purd. 3999, and supplements as noted below. It has been divided into clauses for the sake of clearness and convenience of reference.

The following clauses are recommended for omission:

(1) Purchase of other real estate when needful (adjoining) to that already owned by such party, or useful to the business thereon carried on or when necessary to protect any security or rent on property exposed to judicial sale. Provided that no corporation shall be so authorized to purchase beyond its charter license.

(2) Every power to sell in fee simple real estate created by deed or will shall be taken to confer authority to sell and convey, reserving ground rents or rents in fee, and the same to release and extinguish, according to law.

Special Notes to Section 1.

[1] The words "or a ground rent issuing thereout" are added to make clear that the jurisdiction extends to ground rents purchased, etc.

[2] These words incorporate the provisions of the supplement of April 27, 1855, P. L. 368, Section 5, 4 Purd. 4031. The confirmatory act of April 21, 1856, P. L. 486, Section 1, 4 Purd. 4034, may be omitted.

[3] The words "by purchase by a trustee, executor or guardian" are inserted to make clear that the jurisdiction of the orphans' court refers to these cases, and dissipate any idea that the jurisdiction under the previous words is conferred only where the title has been acquired by gift under a will or deed.

[4] The cases in which the court may act come first in the Price Act. The proposed revision first collects together from the act and the supplements the various dispositions authorized. The advantages are that these are all brought together and it is made clear that the court may make any of the dispositions in any of the cases where jurisdiction is conferred.

[5] "Confirm." This word incorporates the provisions of the Act of April 13, 1854, P. L. 368, Section 3, 4 Purd. 4030.

[6] The words "extinguishment or assignment of ground rents" are inserted to make clear that the court has jurisdiction to direct the extinguishment or assignment of a ground rent, as to which there is now some doubt.

[7] In the Price Act, Section 1, and incorporating act of May 23, 1913, P. L. 345, 6 Purd. 7051, in connection with the clauses in the next section conferring jurisdiction where the legal title is held by persons under disability, fiduciaries, etc.

[8] Taken from Section 7 of the Price Act, 4 Purd. 4027. The words "without public or private sale" are recommended for omission, as the words "squaring and adjusting" sufficiently describe the transaction and necessarily exclude the idea of a sale.

[9] This incorporates the Act of June 8, 1874, P. L. 277, Section 1, 4 Purd. 4033.

[10] This incorporates the Act of April 18, 1864, P. L. 462, Section 1, 4 Purd. 4031. The words "without public or private sale" are recommended for omission for the reason set forth in note 8, supra.

[11] Taken from Section 4 of the Price Act, 4 Purd. 4022.

SECTION 2. The several courts aforesaid shall exercise the jurisdiction conferred by Section 1 of this Act in all cases:

(*a*) Where the legal title is held: (1) By minors, lunatics or habitual drunkards, so duly found by inquisition, or by weak-minded persons for whom guardians have been appointed.[1] (2) By a married woman or married man whose spouse is a lunatic, or has abandoned him or her for one year or has been absent and unheard of for seven years.[2] (3) By corporations of any kind having no capacity to convey or by any unincorporated association.[3] (4) By any religious, beneficial or charitable society or association incorporated or unincorporated, and the title is subject to forfeiture if real estate is held in excess of the amount prescribed by its charter or now or hereafter prescribed by law.[3] (5) By a corporation of any kind or individual or individuals and is subject to a trust of any description whatever.[4] (6) By any person who may have been absent and unheard from for seven years under those circumstances from which the law would presume his or her decease.[5] (7) Or any interest therein is held by any person under legal disability to dispose thereof.[6]

(*b*) Where the legal title is an estate tail or is subject to contingent remainders, executory devises, or remainders to a class, some or all of whom may not be in being or ascertained at the time of the entry of the decree.[7]

(*c*) In all cases where estates shall have been devised or granted for special or limited purposes.[8]

(*d*) Where there is a power of sale but (1) the time may not have arrived for its exercise, (2) any preliminary act may not have been done to bring it into exercise, (3) the time limited for its exercise may have expired, (4) any one or more persons required to consent or join in

its exercise may be a minor, non compos mentis, removed out of the state, have died, refuse to act, unreasonably withhold consent, or be absent and unheard of.[9]

(*e*) Where there has been or shall be a defective appointment in any deed or will and the necessary power is not given to the executor, devisee or appointee to make sale and conveyance of real estate.[10]

(*f*) Where a trust has been created and no power conferred on the trustee to do any of the acts which the court is empowered to authorize or confirm under the provisions of Section 1 hereof.[11]

Such jurisdiction may be exercised whether the ownership or interest in real estate be held in severalty, joint tenancy or tenancy in common, or by husband and wife as tenants by entireties.[12]

NOTE.—This is derived from Section 2 of the Price Act, amended by the Act of June 14, 1897, P. L. 144, Section 1, 4 Purd. 4003.

The following clauses are recommended for omission:

Where a decedent shall have contracted by parol to sell real estate, and those interested do not think it expedient to plead the statute requiring such contracts to be in writing to enable the purchaser to recover the real estate agreed to be sold. When real estate shall have been purchased or any ground rent reserved and be held by any person acting in a trust or fiduciary capacity. Section 2 of the Price Act.

Whenever in proceedings in partition in equity it shall appear that real estate cannot be divided without prejudice to the interests of the owners. This clause is recommended for omission as it is now superfluous in view of the provisions of the Act of March 14, 1857, P. L. 97, Section 3, and the later statutes relating to partition in equity. See Act of July 14, 1897, P. L. 268, 3 Purd. 3417.

Special Notes to Section 2.

[1] The words "or weak minded persons" have been added; but it is not intended that the provisions of Section 6 of the Act of May 28, 1907, P. L. 292, 6 Purd. 6569, should be repealed.

[2] This section throws together and makes similar the provisions as to the disability of the spouse of a married man or a married woman. The case of the minority of

the wife is omitted as unnecessary in view of the Act of March 22, 1865, P. L. 30, 1 Purd. 1155. In providing for the case of a woman with a lunatic husband, this section incorporates to that extent, the ambiguous Act of April 11, 1866, P. L. 780, 4 Purd. 4034, which extends only to the common pleas.

[3] Several cases are to be provided for (*a*) Corporations having no capacity to convey, a very rare case; (*b*) Unincorporated societies, &c., which could not convey at law; (*c*) Incorporated and unincorporated religious societies, &c., which may hold real estate in excess of the amount prescribed by law. The words of the Price Act are "Where real estate shall be held for or owned by * * * religious, beneficial or charitable societies or associations, incorporated or unincorporated," which words do not make clear just what the exact jurisdiction conferred is.

[4] This is designed to cover all cases of trusts and make unnecessary the words of the Price Act which are as follows: "When real estate shall be held for minors, lunatics, habitual drunkards so declared by inquisition * * * the sole and separate use of married women, for religious, beneficial or charitable societies or associations, incorporated or unincorporated, or for any other corporation, or by trustees for any public or private use or trust, and generally in all cases where estates have been or shall be devised or granted in trust or for special or limited purposes."

[5] Taken from Price Act, no change.

[6] Taken from Price Act.

[7] In this clause are thrown together all cases of legal limitations of the title, and the language incorporates, so far as gifts to a class are concerned, the provisions of the Acts of June 14, 1897, P. L. 144, Sec. 1, 4 Purd. 4003; June 15, 1897, P. L. 159, 4 Purd. 4033. The Act of June 14 provides for vested remainders which are liable to open and let in after-born children. The Act of June 15 provides for "Lands * * * devised or granted for life or for the life of another, and with remainder limited to a class of persons, some or all of whom may not be in being at the time of the decree." "The entry of the decree." These words are better English than the words "the time of the decree," which were probably sufficiently plain. The words "or ascertained" are added because a case may occur of a remainder to a class of persons in being but not ascertained, *e. g.* "remainder to the children of my daughter living at the time of her death." The children born are in being but not ascertained as the ones who will take at the death of the daughter.

The words "the lien of debts of a decedent not of record" are omitted in line 2, this provision seeming to be unnecessary since the lien has been reduced by the Fiduciaries Act to one year.

[8] These words may appear to be superfluous, but it is thought best to retain them.

[9] Taken from the Price Act. The words "be absent and unheard of" are added. The words "a minor" are inserted to give, in cases under this act, the power conferred by Section 15 of the Act of July 27, 1842, P. L 439, 4 Purd. 4885, upon the common pleas.

[10] Taken from Section 2 of the Price Act.

[11] Added because the case where a trustee has no power of sale is not expressly covered by the Price Act.

[12] The word "coparceny" in the original act is omitted, as this tenancy is unknown in Pennsylvania.

Section 3. Nothing herein contained shall be taken to repeal or impair the authority of any act of assembly, general or private, authorizing the sale of real estate by decree of court or otherwise, nor to affect or impair any rights or powers, otherwise existing in any person or corporation to do any of the acts which the court is empowered to authorize or confirm under the provisions of Section 1 of this Act.

Note.—This is derived from Section 2 of the Price Act, amended by Act of June 14, 1897, P. L. 144, 4 Purd. 4003, 4016.

Section 4. All jurisdiction conferred by this Act on the orphans' court or the court of common pleas shall be exercised on the petition of any party in interest supported by oath or affirmation; and if all proper parties shall not voluntarily appear as petitioners or respondents, the court shall fix a day for them to appear and cause a citation to be served on all persons in being who shall not have appeared, and who shall have any present or expectant interest in the premises, warning them to appear, and that they shall be heard on the day designated, and for those who cannot otherwise be served, cause advertisement to be made in manner most likely to afford notice, and service made in any part of the United States and the territories and possessions thereof, or elsewhere, with

oath or affirmation of the fact, taken before any judge or justice of the peace or notary public, or any person authorized by the laws of the United States to take oaths or affirmations in foreign countries, and filed of record, shall be good service. Service having been made as aforesaid, the court shall, on the day fixed, make such decree as shall be proper in the premises. Guardians shall be notified and appear for their wards; and if minors have no guardian, the court may appoint one for them in the manner now or hereafter prescribed by law for the appointment of guardians, and such appointment may be made on the petition of any party interested with notice to the persons who shall by law be charged with the duty of petitioning for the appointment of a guardian. Committees and guardians shall be notified and appear for lunatics, habitual drunkards and weak-minded persons, and in each of such cases notice shall be given to the next of kin. Trustees shall be notified and appear for the cestuis que trust, provided that cestuis que trust of age and sound mind, having vested interests or interests subject to a condition precedent, shall also be notified, and all cestuis que trust not in being or unascertained shall be represented by the trustees aforesaid.

NOTE.—This is founded on Section 3 of the Price Act, 4 Purd. 4017, and has been extended to include parties in interest in foreign countries or to authorize service in foreign countries.

SECTION 5. In all cases where, under the provisions of this Act, sales, mortgages, leases, or conveyances on ground rent shall be authorized or directed, the same shall be made by executors, administrators, guardians, trustees, committees or owners having a present vested interest, or trustees appointed for the purpose, as the court may order.

NOTE.—This is founded on a part of section 4 of the Price Act, 4 Purd. 4019, with the addition of the provision as to trustees appointed for the purpose.

SECTION 6. Where lands and tenements are held by will or otherwise, for life or pur autre vie, by any person or persons, with remainder to any minor or minors, and it shall appear to the court of the proper county, that it would be to the interests of such minor or minors that the same should be sold, in every such case upon the application of the tenant or tenants for life, or pur autre vie, as the case may be, the said court shall appoint a trustee to make sale of said lands; and the said trustee shall receive and hold the proceeds of such sale in trust for the parties in interest therein, and shall invest the same in investments authorized by law, and shall pay the interest thereof, as it shall accrue, to the tenants for life, or pur autre vie, until the estate for life, or pur autre vie, shall have terminated, and shall then pay over the principal sum to the person or persons entitled to such remainder.

NOTE.—This is Clause II of section 1 of the act of April 3, 1851, P. L. 305, 1 Purd. 1119, altered by substituting "invest the same in investments authorized by law" for "loan the same upon good real estate security, upon bond and mortgage," and by omitting the word "orphans' " in the fourth line, and the reference to confirmation of the sale.

The remainder of Section 1, and Sections 2, 3 and 4 of the act of 1851 are recommended for repeal as being sufficiently covered by other sections of the present draft.

SECTION 7. Every such decree made by the court shall have the effect as to the title authorized to be transferred (*a*) Of a common recovery to bar an estate tail or a remainder, whether contingent or to a class. (*b*) Of barring executory devises. (*c*) Of defeating the right of the commonwealth to forfeit real estate that may have been held by or for any corporation in excess of the amount now or hereafter duly authorized by law, only, however, in the case where no proceedings to procure a forfeiture shall have been commenced before the filing of the petition. (*d*) Of discharging the lien of decedents' debts

not of record. In all cases where the proceedings shall be for the purpose of freeing the title of any of the limitations or defeasibility described in this section, that purpose shall be set forth in the petition in addition to the explanation of the title.

NOTE.—This is derived from Sections 5 and 6 of the Price Act, 4 Purd. 4024–5. The jurisdiction to sell for the purpose of discharging the lien of debts not of record is omitted above as unnecessary, but this does not prevent the discharge of such liens by a sale under the act. In the last sentence, "or liens" is omitted after "limitations," and "or defeasibility" substituted.

SECTION 8. The title transferred in pursuance of any such decree of the court shall be such as is authorized in the decree, which title shall be indefeasible by any person ascertained or unascertained or any class of persons mentioned in the petition or decree and having a present or expectant interest in the premises and shall be unprejudiced by any error in the proceedings of the court, and where security shall be entered in accordance with the provisions hereof, no party who shall pay over money in pursuance of the decree of the court shall be liable to see to the application thereof, or be in any manner liable for or affected by any lien of debts of a decedent not of record, or by any trust, limitation of, or defects in the title set out in the petition or decree in pursuance of which the money is paid over.

NOTE.—This is derived from Section 5 of the Price Act, 4 Purd. 4023.

SECTION 9. In all cases where the court shall authorize or confirm the making of a mortgage, in any of the cases provided for in this act, the title shall upon the mortgage being duly paid and satisfied of record revert to its former condition, except that nothing herein contained shall operate to extend the lien of the debts of a decedent not of record beyond the time now or hereafter allowed by law, and upon legal proceedings being brought upon the mortgage or bond accompanying the same as may now

or hereafter be provided by law and the title being sold at sheriff's sale, in pursuance of such proceedings, the surplus proceeds of the sale, if any, after paying the mortgage, with interest and all costs, and liens, which may by law be payable out of the fund, shall be paid over to the party who made the mortgage, or such other person as the court may direct or appoint for that purpose, to be held by him as part of the mortgage money and subject to the same liens or limitations, provided that the sheriff shall not pay over any such sum until such additional bond shall be filed as the orphans' court may require under the circumstances of the case.

NOTE.—This is a new section, covering matters not provided for in the Price Act.

SECTION 10. The purchase money, mortgage money, ground or other rents reserved or the title received in the case of an exchange or partition, for the title subject to a lien or limitation, shall be held for and applied to the use and benefit of the same persons and for the same interests, legal or equitable, present or future, vested, contingent or executory as the title so sold, mortgaged, conveyed on ground rent, let, partitioned or exchanged had been subject or held excepting only the case of an estate tail or the title of a corporation subject to forfeiture which in each case shall by the proceedings, without the necessity of a bond being filed by either the corporation or the tenant in tail, be converted into an absolute estate in fee simple and all remainders, whether contingent or to a class, executory devises, and debts of a decedent not of record shall be transferred to the fund or title raised by the proceedings in pursuance of the decree, as to which fund or title they shall take effect in like manner as they would have taken effect as to the title transferred under the decree. The court shall make such order or orders from time to time as to the distribution or investment of such funds as may be requisite to protect the interest of all persons who are or may become entitled thereto or to any part thereof.

In every case of a sale, mortgage, lease or conveyance on ground rent under the provisions hereof, the purchase money, mortgage money, ground rent or other rents reserved shall nevertheless have and retain the quality of real estate as respects the devolution under the intestate laws of the interest of any infant, lunatic, or person non compos mentis as whose property the land was sold, mortgaged, leased or conveyed on ground rent. The court having jurisdiction may direct the application of such proceeds or part thereof for the maintenance and education of minor parties whose personal estate shall be insufficient for such purposes, or generally for the maintenance or education of parties having the like interests vested or expectant, provided such moneys can be equally and equitably so applied and without diminution of the capital that may of right become the property of parties having unbarred interests or title in remainder, or by executory devise.

NOTE.—This is derived from Section 6 of the Price Act, 4 Purd. 4025, and Section 2 of the Act of June 15, 1897, P. L. 159, 4 Purd. 4033.

SECTION 11. No principal moneys raised by sale or mortgage, as aforesaid, shall be expended for any other purpose than for the payment of liens upon or the improvement of the same real estate when mortgaged, or other real estate when held for the same uses and persons, except as provided in Section 10 of this Act; and it shall be the duty of the court to decree the proper application of all purchase moneys and rents, with the aid of an auditor when deemed necessary, to the discharge of liens and to parties interested, as and when they may be entitled.

NOTE.—This is part of the proviso to Section 6 of the Price Act, 4 Purd. 4025.

SECTION 12. In all cases where an application shall be made to the court for a decree authorized under any of

the provisions of this act, the court may appoint a suitable person as master to investigate the facts of the case, and to report upon the expediency of granting the application and, in cases where authority is asked to make a sale or mortgage, upon the amount to be raised thereby; and upon such report being made, the court may decree accordingly.

NOTE.—This is copied from Section 16 (*e*) of the Fiduciaries Act.

SECTION 13. In all cases where the carrying out of any decree of the court under the provisions of this act shall involve the receipt of money by the person carrying it out, the court shall direct the person acting under the decree to file a bond to the commonwealth in a sufficient amount conditioned for the proper application of all moneys to be received, which bond shall inure to the benefit of all parties interested and be executed by two individual sureties or by one corporate surety, approved by the court, and before any such decree shall be executed, such bond, with sureties as may be required, shall be filed: *Provided*, That where a corporation duly authorized by law, shall be designated to carry out any such decree, the court may, in lieu of security as aforesaid, permit such corporation to enter its own bond without surety.

NOTE.—This is copied from Section 16 (*f*) of the Fiduciaries Act, which is founded in part on Section 6 of the Price Act, 4 Purd. 4026.

Section 10 of the Price Act, 4 Purd. 4029, reads as follows: "The directions given in the sixth section of this act in regard to the security to be given in cases of sales, mortgage, or letting of real estate, and the condition of the bond or security therein prescribed, shall apply to all cases of sales or mortgage of real estate by order of the courts of this commonwealth: *Provided*, That no decree for the sale, mortgaging, or letting of any real estate under the provisions of this act, shall be made except when the president of the court, or the law judge or judges thereof, shall be present, and that the acts in relation to special courts, where the president judge shall

be interested, related to parties in interest, or otherwise incapable of acting, shall apply to all such provisions."

This section was apparently introduced in the Price Act to cure the inconsistency between Sections 4 and 6: Thorn's Appeal, 35 Pa. 47. The Commissioners recommend its repeal as unnecessary in the Revised Act.

SECTION 14. Whenever, by the provisions of this act, it shall be lawful for the court to order the public sale of real estate, public notice of such sale shall be given by the person who is to make the sale, once a week for a period of three weeks before the day appointed therefor, by advertisement in at least one newspaper published in the county, if there be one, or if there be none, then in an adjoining county; and in all cases, notice shall also be given by handbills, one of which shall be posted at a conspicuous place on the real estate proposed to be sold, and at least three of which shall be posted at three of the most public places in the vicinity of such estate.

NOTE.—This is copied from Section 16 (*g*) of the Fiduciaries Act, and, for the sake of uniformity, is substituted for the provisions of Section 4 of the Price Act, 4 Purd. 4021.

SECTION 15. Whenever, under the provisions of this act, the court has power to authorize or confirm a sale of real estate, the same may be made upon such terms as the court shall approve, all unpaid purchase money to be secured on the premises by mortgage.

NOTE.—This is copied from Section 16 (*h*) of the Fiduciaries Act, which is derived in part from section 4 of the Price Act, 4 Purd. 4022.

SECTION 16. All deeds, mortgages or leases executed in pursuance of any decree of the court under the provisions of this act may be acknowledged before any officer or person now or hereafter authorized by the laws of this commonwealth to take the acknowledgment of deeds and other instruments of writing to be recorded therein.

NOTE.—This section is designed to make the law relating to the acknowledgment of instruments executed under the authority of the act similar to the general law prevailing in such cases. There seems to be no reason now for making any special distinction as to the acknowledgment of such instruments. The various acts supplementing the Price Act relating to acknowledgments are as follows:

Act of April 13, 1854, P. L. 368, section 1, 4 Purd. 4029; April 1, 1863, P. L. 187, 4 Purd. 4031; March 23, 1867, P. L. 43, section 1, 4 Purd. 4032; April 17, 1866, P. L. 108, as amended by Act of April 22, 1903, P. L. 241, 4 Purd. 4031.

SECTION 17 (*a*) In all cases where the sale of real estate shall be made by an executor, administrator, guardian or trustee under an order of, or confirmed by, the court, or where the making of a mortgage by such fiduciary shall be authorized by said court, and the letters testamentary or of administration shall be revoked, or the executor, administrator, guardian or trustee shall be removed, or shall die, or become insane, or otherwise be incapable, before a conveyance is made to the purchaser, or before a mortgage is executed and delivered, it shall be lawful for the successor of such executor, administrator, guardian or trustee, having first given security, to be approved by the said court, for the faithful appropriation of the proceeds of such sale, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale, or to execute and deliver said mortgage. If there shall be no such successor who shall have given security as aforesaid, the said court shall have power, on petition of the purchaser, to direct the clerk of the court to execute and deliver to the purchaser the necessary deed of conveyance, on his full compliance with the terms and conditions of sale, paying into court the moneys payable, and executing and delivering to the clerk any bond and mortgage required by the said terms and conditions, which moneys and bond and mortgage shall remain subject to the disposition of the court; or, where the making of a mortgage by a fiduciary shall be

authorized by said court, the court, under the circumstances aforesaid, shall have power to direct the clerk of the court to execute and deliver such mortgage. The like proceedings may be had where an executor, administrator, guardian or trustee shall neglect or refuse to execute and deliver such deed or mortgage for the space of thirty days after due notice of an order of the court requiring him to execute and deliver the same.

NOTE.—This is modeled upon Section 16 (*j*) 1 of the Fiduciaries Act.

(*b*) In all cases where the sale of real estate shall be made by co-executors, co-administrators, co-guardians or co-trustees under an order of, or confirmed by, the court, or where the making of a mortgage by such co-fiduciaries shall be authorized by said court, and if one or more of such co-fiduciaries shall be removed, or shall die, or become insane, or otherwise be incapable, before a conveyance is made to the purchaser, or before such mortgage is executed and delivered, said court may, upon the facts being made to appear by petition duly verified, authorize the surviving or remaining fiduciary or fiduciaries to execute and deliver to the purchaser a deed of conveyance for the real estate so sold, on the purchaser's full compliance with the terms and conditions of sale, or to execute and deliver such mortgage.

NOTE.—This is modeled upon Section 16 (*j*) 2 of the Fiduciaries Act.

(*c*) Where authority is or shall be given by decree of any court to executors, administrators, guardians or trustees to sell real estate, and any of such executors, administrators, guardians or trustees shall have died, been removed, become insane or otherwise be incapable, or cease to act, before a sale is effected, in all such cases said court may, upon the facts being made to appear by petition duly verified, authorize the surviving or remaining fiduciary or fiduciaries to effect such sales, with as

full effect in all particulars, as if effected or executed by the executors, administrators, guardians or trustees in office at the time the sale was originally decreed.

NOTE.—This is modeled upon Section 16 (*j*) 3 of the Fiduciaries Act.

(*d*) Every sale made, and every deed or mortgage executed and delivered in pursuance of, and agreeably to the provisions of this section shall vest the property therein described in the grantee or mortgagee, as fully and effectually as if the same had been made, executed and delivered by all the fiduciaries to whom the authority to sell or mortgage was originally given.

NOTE.—This is copied from Section 16 (*j*) 4 of the Fiduciaries Act.

(*e*) In all cases of sales or mortgages under the order of, or confirmed by the court, the title of the purchaser or mortgagee shall not be affected by the subsequent revocation of the letters testamentary or of administration of the executor or administrator making such sale or mortgage, or by the subsequent removal of the executor, administrator, guardian or trustee making such sale or mortgage.

NOTE.—This is copied from Section 16 (*j*) 5 of the Fiduciaries Act.

(*f*) Whenever, in pursuance of proceedings in the court of any county, any person therein described as a trustee, guardian, executor, administrator, or as standing in any other fiduciary relation to the parties interested, shall grant and convey or mortgage any real estate, in which proceedings security shall be duly entered by him or her, under the order or decree of the court, no irregularity or defect in his or her original appointment, or the absence of any proper qualification in respect thereto, shall affect the title of the grantee, purchaser or mortgagee or the liability of the sureties, but the same shall be as valid in all respects as if such irregularity or defect had not existed.

NOTE.—This is copied from Section 16 (*j*) 6 of the Fiduciaries Act.

SECTION 18. Whenever any court, having jurisdiction under this act to decree a sale or mortgage of real estate, shall issue its order to any executor, administrator, guardian or trustee, specially appointed for the purpose or otherwise, to sell or mortgage such real estate, and shall, in any case within its jurisdiction, give authority to any executor, administrator, guardian or trustee, to bid at such sale, and shall confirm the sale to such fiduciary or shall authorize the making of such mortgage to any executor, administrator, guardian or trustee, the said court may make an order directing its clerk to execute a deed or mortgage, as the case may be, for said real estate to such purchaser or mortgagee, who shall give security and shall account for the amount of said purchase money or mortgage money, in the settlement of his accounts, to said court.

NOTE.—This is copied from Section 16 (*k*) of the Fiduciaries Act.

SECTION 19 (*a*) In all proceedings under the provisions of this act, where the real estate shall lie wholly within one county, the petition shall be presented only in the court of that county.

NOTE.—This is a new clause in accordance with the proviso to Section 1 of the Price Act.

(*b*) When an application shall be made, under the provisions of this act, for the sale, mortgaging, leasing or other proceedings relating to real estate, through which real estate the line dividing two or more counties runs, the court of the county in which the mansion house is situated, or, if there be no mansion house, the court of the county where the principal improvements may be, or, if there be no improvements, the court of either county, may exercise jurisdiction as to the whole of such real estate, irrespective of the county line; and

any such sale, mortgaging, leasing or other decree relating to real estate, shall be as effectual as if the whole of such real estate had been within the county whereof said court has jurisdiction. Notices of said proceedings, as required by this act, shall be given in all the counties in which the land is situated, and a certified copy of all proceedings shall be filed in the proper court of each county in which said land is situated. Any mortgage taken to secure the purchase money, or any part thereof, shall be duly recorded in each of the counties in which said lands lie, as required by law.

NOTE.—This is derived from section 1 of the act of May 28, 1915, P. L. 635, 6 Purd. 7286, supplementary to the Price Act. The last two sentences have been made uniform with the provisions of Section 16 (*l*) 2 of the Fiduciaries Act.

SECTION 20 (*a*) The courts of the several counties of this commonwealth, in all cases where, under the provisions of this act, such courts have power to order the sale of real estate, may authorize or direct a private sale, if, in the opinion of the court, under all the circumstances, a better price can be obtained at private than at public sale, as where the interest shall be undivided, or for any other sufficient cause.

NOTE.—This is copied from Section 16 (*m*) 1 of the Fiduciaries Act, and is intended to supersede so much of section 4 of the Price Act as authorizes private sales.

(*b*) Any party interested as heir, devisee or intending purchaser, or any legatee whose legacy is, by the express terms of the will, or by law, charged on such real estate, may appear and object to such private sale on account of the insufficiency of the price, and, if such objection be sustained, may offer to give or pay a substantial increase for such property, and the court, at its discretion, may thereupon authorize or direct such sale, or refuse to authorize or direct the same, and accept any substantially increased offer, and may authorize the sale of such property to such new bidder

upon compliance with the conditions of sale and giving such security as shall be directed by the court; or, such party interested or legatee may appear as aforesaid and object to such sale on any legal or equitable grounds: *Provided*, That nothing herein contained shall be construed to affect the existing law with respect to objections to public sales.

NOTE.—This is modeled upon Section 16 (*m*) 3 of the Fiduciaries Act.

SECTION 21. All public sales of real estate under the provisions of this act shall be subject to confirmation by said court; but in the case of private sales authorized or directed under the provisions of this act, no return or confirmation shall be necessary.

NOTE.—This is modeled upon Section 16 (*n*) of the Fiduciaries Act.

SECTION 22. All public sales of real estate under the provisions of this act shall have the effect of judicial sales as to the discharge of liens upon the real estate so sold; but private sales shall not discharge the liens of debts of record.

NOTE.—This section is substituted for the provision of Section 5 of the Price Act that "by every such public sale the premises sold shall be discharged from all liens," and the provision of Section 2 of the supplementary Act of March 23, 1867, P. L. 43, 4 Purd. 4032, that private sales "shall discharge the premises sold from the lien of the debts of the decedent, except debts of record, and debts secured by mortgage; *Provided*, That the security, required" by the Price Act "shall have been duly entered."

SECTION 23. Whenever a public or private sale of real estate shall be authorized, directed or confirmed by any court under the provisions of this act, the person or persons purchasing the real estate so sold and taking title in pursuance of the decree of the court, shall take such title free and discharged of any obligation to see to the application of the purchase money.

NOTE.—This is copied from Section 16 (*p*) of the Fiduciaries Act.

SECTION 24. In all cases and proceedings under this act, appeals may be taken to the proper appellate court from the orphans' court, as now provided by law in other cases, and from the court of common pleas, as provided in equity cases: *Provided*, That if any decree be carried into execution before the appeal be perfected, and written notice thereof given to any vendee, mortgagee, or lessee, any reversal thereof shall not affect the right or title of such vendee, mortgagee, or lessee, but the purchase or mortgage moneys or rents shall stand in lieu of the premises sold or mortgaged, or leased, so far as thus encumbered: *Provided, further*, That before any decree be carried into effect to afford such indemnity, twenty-one days be allowed from its entry to take and perfect such appeal.

NOTE.—This is section 8 of the Price Act, 4 Purd. 4028, modified by substituting "proper appellate" for "supreme," and by omitting, after "equity cases" the words "in the respective counties of the state." In the second proviso, the period has been made twenty-one instead of twenty days, to correspond with the period fixed by the general appeals act.

SECTION 25. This act shall be known and may be cited as the Revised Price Act of 1917.

SECTION 26. The following acts and parts of acts of assembly are repealed as respectively indicated. The repeal of the first section of an act shall not repeal the enacting clause of such act.

Section 10 of an act entitled "An Act supplementary to the several acts of this commonwealth concerning partitions, and for other purposes therein mentioned," approved April 7, 1807, P. L. 155, absolutely.

Section 2 of an act entitled "A supplement to the intestate law of this commonwealth," approved April 8, 1826, P. L. 255, absolutely.

Section 1 of an act entitled "An Act supplementary to the various acts relating to orphans' and registers courts, and executors and administrators, and the act relating to the measurement of grain, salt, and coal," approved June 16, 1836, P. L. 682, absolutely.

Section 2 of an act entitled "A supplement to an act, entitled 'An Act relating to orphans' court,' approved the twenty-ninth of March, one thousand eight hundred and thirty-two," approved March 16, 1847, P. L. 474, absolutely.

Sections 1 to 5, inclusive, of an act entitled "An Act supplementary to an act passed the twenty-ninth day of March, one thousand eight hundred and thirty-two, entitled 'An Act relating to orphans' courts,' and relating to contracts of decedents and escheats in certain cases, and relative to the district court of the city and county of Philadelphia, and to registers of wills," approved April 3, 1851, P. L. 305, absolutely.

Sections 1 to 8, inclusive, and Section 10 of an act entitled "An Act relating to the sale and conveyance of real estate," approved April 18, 1853, P. L. 503, absolutely.

Sections 1 and 3 of an act entitled "A supplement to an act, entitled 'An Act relating to the sale and conveyance of real estate,'" approved April 13, 1854, P. L. 368, absolutely.

Section 5 of an act entitled "An Act to amend certain defects of the law for the more just and safe transmission and secure enjoyment of real and personal estate," approved April 27, 1855, P. L. 368, absolutely.

An act entitled "A further supplement to the act, entitled 'An Act relating to the sale and conveyance of real estate,' passed the eighteenth day of April, one thousand eight hundred and fifty-three," approved April 1, 1863, P. L. 187, absolutely.

An act entitled "Supplement to an act, entitled 'An act relating to the sale and conveyance of real estate,' approved the eighteenth day of April, Anno Domini

one thousand eight hundred and fifty-three," approved April 18, 1864, P. L. 462, absolutely.

An act entitled "A supplement to an act relating to the sale and conveyance of real estate, approved the eighteenth day of April, one thousand eight hundred and fifty-three," approved April 17, 1866, P. L. 108, absolutely.

Sections 1 and 2 of an act entitled "An Act relating to judicial sales, and the preservation of the lien of mortgages," approved March 23, 1867, P. L. 43, absolutely.

An act entitled "A further supplement to an act, entitled 'An Act relating to the sale and conveyance of real estate,' approved the eighteenth day of April, Anno Domini, one thousand eight hundred and fifty-three, authorizing the courts to decree the leasing and combination of lands for mining purposes," approved June 8, 1874, P. L. 277, absolutely.

Section 1 of an act entitled "An Act to amend the second section of an act, entitled 'An Act relative to the sale and conveyance of real estate,' approved the eighteenth day of April, one thousand eight hundred and fifty-three, extending the provisions thereof to real estate upon which are limited vested remainders which are liable to open and let in after born children, and validating sales of real estate heretofore made by proceedings under said act of lands and tenements subject to such remainders," approved June 14, 1897, P. L. 144, absolutely.

Sections 1 and 2 of an act entitled "An Act authorizing the several orphans' courts of this commonwealth to decree the sale, mortgaging, leasing or conveyance upon ground-rent, of lands devised or held with remainder to a class of persons, some or all of whom are unborn, and to validate certain sales and conveyances heretofore made by decree of court in such cases," approved June 15, 1897, P. L. 159, absolutely.

An act entitled "An Act amending an act approved April seventeenth, one thousand eight hundred and sixty-six, entitled 'A supplement to an act relating to the sale and conveyance of real estate,' approved the eighteenth

day of April, one thousand eight hundred and fifty-three; providing that deeds may be acknowledged before any justice of the peace, notary public, or other officer having authority to take acknowledgment of deeds or other instruments of writing," approved April 22, 1903, P. L. 241, absolutely.

An act entitled "An Act relating to acknowledgments of deeds; authorizing county treasurers, county commissioners, sheriffs, executors, administrators, trustees, or other persons acting in an official or representative capacity, where now required or authorized to make acknowledgment of deeds or other instruments before justices of the peace, to make acknowledgments of deeds and other instruments before a notary public, or any officer authorized by law to take acknowledgments of deeds, and validating all such acknowledgments heretofore made before other officers than justices of the peace," approved April 23, 1909, P. L. 156, in so far as it relates to acknowledgments of deeds or other instruments made in pursuance of decrees entered under the provisions of this act.

An act entitled "An Act authorizing the several orphans' courts to empower guardians of the estates of minors to join with the cotenants of said minors in effecting amicable partition of lands held in common," approved May 23, 1913, P. L. 345, absolutely.

An act entitled "A supplement to an act approved the eighteenth day of April, one thousand eight hundred fifty-three, entitled 'An Act relating to the sale and conveyance of real estate,'" approved May 28, 1915, P. L. 635, absolutely.

All other acts of assembly, or parts thereof, that are in any way in conflict with this act, or any part thereof, are hereby repealed.

REGISTER OF WILLS ACT.

TABLE OF CONTENTS.

PAGE

SECTION 1. Oath and bond of register 364
(a) Oath 364
(b) Bond 364
1. Form and approval 364
2. Acknowledgment, recording and filing of bond 365
3. Copies of record of bond as evidence 365
4. Provisions not to apply to certain counties 366
(c) No liability on bond where letters granted under order of court 366

SECTION 2. Deputy register 366

SECTION 3. Jurisdiction of register 366

SECTION 4. Before what register wills shall be probated 367

SECTION 5. Revocation of letters of administration by register 367

SECTION 6. Probate of nuncupative wills 368

SECTION 7. Probate of copies of wills proved in other states or counties 368

SECTION 8. Citation to person having custody of will; certification to orphans' court 369

SECTION 9. Subpoenas to witnesses; attachments; witness fees and mileage 370

SECTION 10. Commissions or rules to take depositions 371

SECTION 11. Recording and filing wills; certified copies 371

SECTION 12. Wills or papers in other than English language 372
(a) Translation to be furnished, filed and recorded 372
(b) Effect of failure to furnish translation 372

SECTION 13. Recording inventories and appraisements 372

SECTION 14. Certified copies of bonds, inventories, accounts, etc., to be furnished by register 373

SECTION 15. Filing copies of wills and probates in other counties 374

SECTION 16. Effect of probate 375
(a) Conclusiveness 375
(b) When no probate within three years; effect as to conveyances or mortgages 376

PAGE

SECTION 17. Precept by register to common pleas for issue *d. v. n.*... 376

SECTION 18. Certification of record to orphans' court on order of court..... 378

SECTION 19. Certifying record to orphans' court where there are difficult or disputable questions..... 379

SECTION 20. Caveats..... 380
(*a*) Bond..... 380
(*b*) Failure to give bond..... 380
(*c*) Costs on caveat or appeal..... 380
(*d*) Appeals from orders as to security and taxation of costs. 381

SECTION 21. Appeals to the orphans' court..... 381
(*a*) Period for appeal..... 381
(*b*) Effect of appeal..... 382

SECTION 22. Bill of costs..... 382

SECTION 23. Procedure to collect costs..... 383

SECTION 24. Register to collect fifty cents for use of commonwealth. 383

SECTION 25. Short title section..... 384

SECTION 26. Repealer..... 384

AN ACT.

Relating to the qualification, jurisdiction, powers and duties of registers of wills, and regulating proceedings before said registers, and the costs thereof, the effects of their acts, and appeals therefrom.

SECTION 1 (*a*) Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That every person who shall be elected or appointed to the office of register of wills, before he shall enter upon the duties of the office, shall make oath or affirmation to support the constitution of the United States and the constitution of this commonwealth, and to perform the duties of the office of register with fidelity.

NOTE.—This is the first part of Section 1 of the Act of March 15, 1832, P. L. 135, 4 Purd. 4075, which was derived from the provisions of the federal and state constitutions, Section 3 of the Act of March 14, 1777, 1 Sm. L. 443; Section 1 of the Act of March 12, 1791, 3 Sm. L. 8; and Section 9 of the Act of April 6, 1830, P. L. 272.

In the first line, the words "elected or" have been inserted.

(*b*) 1. He shall also, with one or more sureties, to be approved by the judge or judges, if there be more than one, of the orphans' court of the county for which the register shall be elected or appointed, and also by the governor, give a joint and several bond to the commonwealth, in a sum equal to half the sum prescribed by law for the official bond of the sheriff for the time being of the same county, with condition faithfully to execute the duties of his said office, and well and truly to account for and pay, according to law, all moneys received by him for the use of the commonwealth, and to deliver up the books, seals, records and other writings, belonging to his said office, whole, safe and undefaced, to his successor in office; which said bond shall be for the use of all persons concerned, and for the relief of all who may be aggrieved by the acts or neglect of such register.

NOTE.—This is the remainder of Section 1 of the Act of 1832. The provision of the Act of 1832 was that the sureties should be approved by "two judges of the common pleas." Section 2 of the Act of March 24, 1877, P. L. 37, 4 Purd. 4076, provided that in counties having separate orphans' courts the approval should be by the judge or judges of the orphans' court, except in counties having less than 300,000 inhabitants. Section 1 of the Act of April 27, 1911, P. L. 87, 6 Purd. 7297, amends the act of 1877 by omitting the proviso. There seems to be no good reason why this section should not apply in all counties. Where there is no separate orphans' court, the approval will be by the same judges as under the Act of 1832, but they will act in the matter as judges of the orphans' court, which seems appropriate.

2. Every person elected or appointed as aforesaid shall cause the bond hereinbefore prescribed, being duly acknowledged by him and his sureties, before a judge of the orphans' court of the county, to be recorded by the recorder of deeds of the county, and as soon afterwards as convenient, to be transmitted into the office of the secretary of the commonwealth for custody, of which transmission he shall be entitled to receive the secretary's certificate, without fee or reward.

NOTE.—This is Section 2 of the Act of March 15, 1832, 4 Purd. 4075, which was founded on Section 1 of the Act of March 12, 1791, 3 Sm. L. 8.

It is now altered by inserting in the first line the words "elected or," and by substituting "judge of the orphans' court of the county" for "magistrate of the city or county respectively."

3. Copies of the record of the official bond of any register, acknowledged and recorded as aforesaid, and duly certified by the recorder of deeds for the time being, shall be good evidence, in any action brought against him or his sureties, on such bond, according to its form and effect, in the same manner as the original would be, if produced and offered in evidence.

NOTE.—This is Section 3 of the Act of March 15, 1832, 4 Purd. 4076, which was founded on Section 1 of the Act of March 12, 1791, 3 Sm. L. 8.

4. The provisions of this clause shall not apply to registers of wills in counties having over eight hundred thousand and under one million five hundred thousand inhabitants according to the last preceding United States census.

NOTE.—This is inserted to exclude counties within the provisions of the Act of April 28, 1915, P. L. 198, 5 Purd. 5360.

(*c*) Whenever letters testamentary or of administration shall have been heretofore, or shall be hereafter granted by the register of wills of any of the counties in this commonwealth, by the direction and in pursuance of an order of the orphans' court, and conformably thereto, the said register and his sureties shall not be liable on the register's official bond for any loss or damage which may have accrued or which may hereafter accrue to any person in consequence of the compliance of said register with the said order of the orphans' court.

NOTE.—This is Section 10 of the Act of April 3, 1851, P. L. 305, 1 Purd. 1080.

SECTION 2. Every register shall appoint and keep a deputy, to officiate in his absence, for whose conduct he and his sureties shall be accountable; and such deputy shall be capable in law to take the probate of wills and testamentary papers, and to grant letters testamentary and of administration, and to do whatever else by law appertains to the office of register.

NOTE.—This is Section 4 of the Act of March 15, 1832, 4 Purd. 4076, which was founded on Section 6 of the Act of March 14, 1777, 1 Sm. L. 443, with the addition of the provision as to liability of the sureties.

The words "testamentary papers" have been substituted for "testaments," and the words "testamentary and" have been inserted after "letters."

SECTION 3. Every register qualified to act, as aforesaid, shall have jurisdiction, within the county for which

he shall have been elected or appointed, of the probate of wills and testamentary papers, of the granting of letters testamentary and of administration, of the passing and filing of the accounts of executors and administrators, and of any other matter whereof the jurisdiction may be at any time expressly annexed to his said office; and the act of any register, in any matter whereof another register has the exclusive jurisdiction, shall be void and of no effect.

NOTE.—This is Section 5 of the Act of March 15, 1832, 4 Purd. 4077, which was new in that act.

The words "elected or" have been inserted in line 3. The words "testamentary papers" have been substituted for "testaments" in line 4, and the words "and guardians" omitted in line 6.

Section 5 of the Act of April 6, 1791, 3 Sm. L. 20, 4 Purd. 4079, makes it the duty of the register to give notice of legacies to public corporate bodies. Section 66 of the Act of February 24, 1834, 1 Purd. 1100, imposed that duty upon the executors, and seems to have superseded the above section of the Act of 1791, which is therefore recommended for repeal. See the note to Section 18 of the Fiduciaries Act, which is founded on Section 66 of the Act of 1834.

SECTION 4. Wills shall be probated only before the register of wills of the county within which was the family or principal residence of the decedent, at the time of his decease, and, if the decedent has no such residence in this commonwealth, then only before the register of the county where the principal part of the goods and estate of such decedent within this commonwealth shall be.

NOTE.—This is a new section, modeled upon Section 2 (*a*) of the Fiduciaries Act, which relates to the granting of letters testamentary and of administration.

SECTION 5. Any register of wills shall have power to revoke letters of administration granted by him whenever it shall be made to appear to him that such letters

have been granted to, or on the nomination of, persons who are not the next of kin of the decedent entitled to administer, or whenever, after the granting of letters of administration, a will of the decedent shall be duly proved and admitted to probate.

NOTE.—This is a new section, intended to be declaratory of the existing law and to remove any possible doubt as to the original jurisdiction of the register in the cases mentioned, as distinguished from the revocation of letters testamentary.

SECTION 6. No nuncupative will shall be admitted to probate, nor shall letters testamentary thereon be issued, till fourteen days after the day of the death of the decedent be fully expired, nor shall any nuncupative will, at any time, be admitted to probate, unless process have first issued to call in the surviving spouse of the decedent, if any, and such of his or her relations or next of kin as would be entitled to the administration of his or her estate in case of intestacy, to contest the same, if they please.

NOTE.—This is Section 10 of the Act of March 15, 1832, 1 Purd. 1068, which was derived in part from Section 5 of the Act of 1705, 1 Sm. L. 33. In the present draft, "surviving spouse" is substituted for "widow."

Section 11 of the Act of 1832, 1 Purd. 1068, also relating to nuncupative wills, is embodied in Section 4 (*c*) of the new Wills Act.

SECTION 7. Copies of wills and testaments proved in any other state, territory or possession of the United States of America, or any foreign country according to the laws thereof, and duly authenticated, may be offered for probate before any register having jurisdiction, and proceedings thereon may be had, with the same effect, so far as respects the granting of letters testamentary, or of administration with the will annexed, as upon the originals; and if the executor or other person producing any such copy shall produce also therewith a copy of the record of

the proceedings for the probate of the original, and of the letters testamentary, or other authority to administer, issued thereon, attested by the person having power to receive the probate of such original, in the place where it was proved, with the seal of office, if there be one, annexed, together with the certificate of the chief judge or presiding magistrate of the state, country, county or district where such original was proved, that the same appears to have been duly proved, and to be of force, and that the attestation is in due form, such copies and proceedings shall be deemed sufficient proof, unless the contrary be shown, for the granting of letters testamentary or of administration with the will annexed, as the case may require, without the production or examination of the witnesses attesting such will.

NOTE.—This is Section 12 of the Act of March 15, 1832, 1 Purd. 1068, which was new in that act. The repeal of Section 1 of the Act of 1705, 1 Sm. L. 33, is recommended.

SECTION 8. The register having jurisdiction, as aforesaid, shall, at the instance of any person interested, issue a citation to any person having the possession or control of a testamentary writing, alleged to be the last will and testament of a decedent, requiring him to produce and deposit the same in his office for probate; and if such person shall conceal or withhold such writing, during the space of fifteen days, after being personally served with a citation issued in the manner aforesaid, it shall be the duty of the register forthwith to certify the record of the proceeding to the orphans' court of said county, and the said court, upon petition of any person interested, shall proceed to enforce obedience to said citation by attachment as in cases of citations issued from said court.

NOTE.—This is Section 7 of the Act of March 15, 1832, P. L. 136, 1 Purd. 1067, which was new in that act.

The words following "manner and form aforesaid," and providing a remedy by attachment in the orphans' court, are substituted for the provision of the Act of 1832 that the person "shall be liable to an indictment as for a

misdemeanor, or to an action for damages by the person aggrieved."

The provision quoted seems to be ineffectual, since no punishment for the "misdemeanor" is prescribed, and it would usually be difficult if not impossible to prove damages. It has been held that, under the Act of 1832, the orphans' court will not attach for failure to obey the citation issued by the register; McDonald's Estate, 14 Phila. 253. The change recommended would therefore seem to be advisable.

SECTION 9. Whenever any testamentary writing shall be offered for probate, or application shall be made for letters testamentary or of administration, before any register having jurisdiction thereof, such register shall have power to issue a subpoena, with or without a clause of duces tecum, to any person whose name may be subscribed to such testamentary writing as a witness, or who may be alleged to him to be otherwise capable of proving the due execution of such testamentary writing, or to any person who may be a material witness in the matter of such probate or of the granting of letters testamentary or of administration, commanding him, under a penalty of three hundred dollars, to appear before said register at his office, at a day certain, not less than five days from the service of such subpoena, and depose and testify what he may know concerning the execution of such writing or otherwise concerning such probate or the granting of letters; and if such person, being subpoenaed as aforesaid, shall refuse or neglect to appear as commanded, the register shall have power to issue an attachment against such witness to compel his appearance, or the party aggrieved may have an action against said witness to recover the said penalty, in the manner allowable by law in cases of subpoenas issued to witnesses by the courts of common pleas. Witnesses appearing before the register in obedience to subpoenas as aforesaid shall be entitled to the same fees and mileage as are allowed by law to witnesses in the orphans' court.

NOTE.—This is Section 8 of the Act of March 15, 1832, 1 Purd. 1067, which was new in that act. It is now ex-

tended to include applications for letters as well as for probate, and to apply to all witnesses and not merely the subscribing witnesses. A subpoena instead of a citation is provided for, and, by omitting the words "such person being within the county, or within thirty miles of the office of said register," the subpoena is made to operate throughout the state. The provision for witness fees and mileage is new.

Under Section 8 of the Act of 1832, it has been held that the register has no power to summon any but the subscribing witnesses: Burns's Will, 11 Phila. 35; Com. *vs.* Bunn, 71 Pa. 405.

SECTION 10. On the application of any person interested, every register shall have power to issue commissions or rules to take the depositions of witnesses in other counties or states, or in foreign countries, in all cases within his jurisdiction.

NOTE.—This is Section 9 of the Act of March 15, 1832, 4 Purd. 4079, which was new in that act.

It is now altered by adding the words "or rules" after "commissions," and by omitting, at the end, the words "upon interrogatories filed in his office." The purpose of these changes is to permit the taking of depositions on rule, without written interrogatories.

SECTION 11. All original wills, after probate, and the copies of all original wills produced under the provisions of this act, shall be recorded and filed by the register of the respective county, and shall remain in his office, except when required to be had before a higher tribunal, by certiorari, or otherwise, and if removed for such cause, they shall be returned in due course to the office where they belong; and the copies of all the probates thereof, under the public seals of the courts or officers where the same may have been, or shall be so taken or granted respectively, except copies of probates of such wills and testaments as shall appear to be annulled, disproved or revoked, shall be adjudged and are hereby enacted to be matter of record, and good evidence to prove the gift or devise thereby made.

NOTE.—This is Section 17 of the Act of March 15, 1832, 1 Purd. 1072, which was derived in part from Section 1 of the Act of 1705, 1 Sm. L. 33.

SECTION 12 (*a*) Any and all person or persons who shall offer for probate any will or codicil, or who shall offer any other written or printed instrument to be recorded in any register's office in this commonwealth, or to be filed in said office as required by law, which will, codicil or instrument shall be in any other than the English language, shall furnish at his, her or their expense, to the register, a sworn translation in English of such instrument, and the register shall attach or cause to be attached such translation to the original, and file both the original and the translation of record in his office, in all cases where filing is now or hereafter may be required by law; but in all cases where recording is now or hereafter may be required, both the original and the translation in English shall be recorded.

NOTE.—This is founded on Section 1 of the Act of May 31, 1893, P. L. 188, 4 Purd. 4053, which act includes also deeds, mortgages, and other instruments to be recorded in any recorder's office or filed in any court of record.

There is a similar local act in Berks County (Act of February 27, 1872, P. L. 173) relating to wills.

(*b*) The register of wills shall not file or mark filed, record or mark recorded, any written or printed instrument in violation of this section, nor shall any paper filed or recorded in violation of this section be notice to any person in any legal proceeding whatever, nor be received or considered in evidence in any proceeding at law, in equity or in the orphans' court.

NOTE.—This is founded on Section 2 of the Act of May 31, 1893.

SECTION 13. It shall be the duty of the registers of wills of the several counties of this commonwealth to record all inventories and appraisements of the estate of

any decedent, filed in the office of the register of wills by the executor or administrator of any such decedent's estate, in a book to be provided for that purpose; and the same shall be indexed by such register of wills, in an index book provided for that purpose; and true and attested copies or exemplifications of all such inventories and appraisements, so enrolled, certified under the hand and seal of such register of wills, shall be allowed in all courts, when produced, and are hereby declared and enacted to be as good evidence and as valid and effectual in law as the original inventory and appraisement themselves; and the said register of wills shall be allowed, for performing such duties, the same fees as are now allowed by law to such officers for performing similar services.

NOTE.—This is Section 1 of the Act of June 24, 1885, P. L. 155, 1 Purd. 1092.

Section 4 of the Act of April 19, 1856, P. L. 459, 4 Purd. 4080, provides: "It shall be the duty of every register of wills to keep a minute-book, duly indexed, in which shall be entered minutes, showing what papers have been filed in his office, and also what collateral inheritance taxes have been paid, and on what estates."

Section 5 of the same act imposes the same duties on the register of Philadelphia County, but adds that he shall "receive therefor ten cents for making said entry of each paper, and each item of property briefly described; and for certificates thereof, the same fees as for recording done in his office, besides thirty-seven and a half cents for the seal."

The repeal of these sections is recommended as obsolete and unnecessary.

SECTION 14. It shall be the duty of every register to make and certify, under the seal of his office, true copies of all bonds, inventories, accounts, actings and proceedings whatsoever, remaining in his office, being thereunto required by any person having an interest therein, and to deliver the same, within a reasonable time, to such person applying therefor, on receiving the fee allowed to him by law for such copy or copies; and if any register shall

refuse, after the tender of his lawful fees, to make or deliver such copy or copies as aforesaid, the orphans' court of the county may, on petition filed by the person so applying to the register, make and enforce such order upon said register as may be necessary to enforce his duty as aforesaid.

NOTE.—This is Section 32 of the Act of March 15, 1832, 4 Purd. 4079, which was Section 39 of the Commissioners' Draft and was "framed with a view to some provisions in the Act 27th March, 1713, Sect. 16 (1 Sm. L. 81) and also in the statute 21 H. 8, c. 5, Section 5." In the present draft, the words at the end, beginning "the orphans' court," have been substituted for "he shall be deemed guilty of a misdemeanor in office." The remedy suggested seems more appropriate than an indictment or impeachment, and in the section as it now stands no penalty is provided for the misdemeanor.

SECTION 15. In any case in which a last will or testamentary paper shall have been duly proved before the register of wills for any county of this commonwealth, and shall relate to real estate in any county thereof, it shall be lawful to take from the office of such register a copy of said will or paper and of the probate thereof, duly certified by such register, under his seal of office, to be a full and perfect copy of the same, and to file the said copy in the office of the register of wills in any county in which any of the real estate owned by the testator may be, which said register shall forthwith record the said copy. And the record of such copy shall be, and is hereby declared to be, as valid and effectual in law as the original will or paper after probate, or its duly certified copy, or its record would be for all purposes of vesting title, of evidence and of notice.

Like proceedings may be had at the instance of any party interested to obtain the certification of all subsequent proceedings appearing in the records of the register of wills concerning such probate.

NOTE.—This is Section 1 of the Act of April 23, 1889, P. L. 48, 1 Purd. 1073, altered by omitting, after "thereof"

in line 4, the following words: "and the probate of this will has become conclusive respecting real estate, either by lapse of time or by judgment of the proper court having jurisdiction." The reason for prohibiting the filing of copies in other counties during this period is removed by the addition of the last paragraph.

The word "copy" has been substituted for "exemplification," since a copy certified by the register is all that the section requires, and an exemplified copy is ordinarily understood to be one authenticated in accordance with the Acts of Congress.

SECTION 16 (*a*) The probate or refusal of probate by the register of the proper county of any will, or any other paper purporting to be a will or codicil thereto, shall be conclusive as to all property, real or personal, devised or bequeathed by such will or codicil or other paper, unless, within two years from the date of such probate or refusal of probate, those interested shall appeal from the decree of the register as herein provided: *Provided*, That all persons who would be sooner barred by this section taking immediate effect shall not be thereby barred before two years from the date hereof.

NOTE.—This is founded on Section 1 of the Act of June 25, 1895, P. L. 305, 1 Purd. 1072, which amended Section 7 of the Act of April 22, 1856, P. L. 533, by reducing the period from five years to three.

The Act of 1895 reads as follows:—

"The probate or refusal of probate by the register of the proper county of any will, or any other paper purporting to be a will or codicil thereto, devising real estate, shall be conclusive as to such realty unless, within three years from the date of such probate or refusal of probate, those interested to controvert or sustain it shall, by caveat and action at law duly pursued, contest the validity of such will or other paper as to such realty or claim thereunder by such action duly prosecuted to final judgment in favor of the plaintiff therein: *Provided*, That all persons who would be sooner barred by this section taking immediate effect shall not be thereby barred before two years from the date hereof."

In Wilson *vs.* Gaston, 92 Pa. 207, the language of the Act of 1856 was criticised adversely, and it was held that the "action at law" referred to was an issue d. v. n.,

and an action of ejectment did not lie to contest the probate of a will. The word "caveat" is also inappropriate, since a caveat necessarily precedes "the probate or refusal of probate." In Wall *vs.* Wall, 123 Pa. 545, it was held that the probate of a will might be collaterally attacked in ejectment where it appeared on the face of the proceedings that the register was without jurisdiction because the will was not signed at the end by the decedent. The ground of this decision was not the language of the Act of 1856, but the general rule that any judgment may be collaterally attacked for want of jurisdiction.

In the present draft, the section is made to apply to personal as well as real estate, the period is reduced from three years to two, and the words "appeal from the decree of the register as herein provided," are substituted for the provision as to "caveat and action at law."

The latter change is in accordance with the opinion in Wilson *vs.* Gaston, supra, and does not interfere with the principle announced in Wall *vs.* Wall, supra.

(*b*) The last will of any decedent may be offered for probate at any time: *Provided*, That if such will shall not have been offered for probate within three years from the date of the death of the testator, the same shall be void and of no effect against a bona fide conveyance or mortgage of the real estate of said decedent, duly recorded before the date of the offering of said will for probate.

NOTE.—The proviso is founded on Section 1 of the Act of April 1, 1909, P. L. 79, 5 Purd. 5884; the first part is new, but declaratory of the present law.

SECTION 17. Whenever a caveat shall be entered against the admission of any testamentary writing to probate, and the person entering the same shall allege as the ground thereof any matter of fact touching the validity of such writing, it shall be lawful for the register, at the request of any person interested, to issue a precept to the court of common pleas of the respective county, directing an issue to be formed upon the said fact or facts, and also upon such others as may be lawfully

objected to the said writing, in substantially the following form, viz.:—

(L. S.) County, *ss.* The Commonwealth of Pennsylvania: To the judges of the court of common pleas of the said county, greeting: Whereas, A. B., on the day of , in the year, etc., presented to G. H., our register of wills of said county, for probate, a certain writing hereto annexed, purporting to have been made the day of , in the year, etc. (or otherwise describing the paper in question), which said writing the said A. B. avers is the last will and testament of the said C. D., and whereas E. D., who is a son and heir of the said C. D. (or intermarried with F. D., who is a daughter and heir, etc., according to the fact), hath objected before our said register that the said writing was procured by duress and constraint (stating the matters of fact objected), and whereas the said A. B. (or E. D.) hath requested that an issue may be directed into our said court to try by a jury the validity of the said writing, and the matters of fact which may be objected thereto in our said court; therefore, we command you that you cause an action to be entered upon the records of our said court, as of the day of the delivery of this our precept into the office of the prothonotary of our said court, between the said A. B. and the said E. D., so that an issue therein may be formed upon the merits of the controversy between the said parties, and tried in due course according to the practice of our said courts in actions commenced by writ; and further, that you cause all other persons who may be interested in the estate of the said C. D., as heirs, relations or next of kin, devisees, legatees or executors, to be warned, so that they may come into our said court and become party to the said action, if they shall see cause, and that you certify the result of the trial so had in the premises into the office of our said register.

Attest. G. H., Register of Wills of the said county.

And the facts established by the trial had and certified to the register as aforesaid, shall not be re-examined by the said register, nor upon any appeal from his decision.

NOTE.—This is Section 13 of the Act of March 15, 1832, 1 Purd. 1070, which was founded in part on Section 18 of the Act of April 13, 1791, 3 Sm. L. 28.

In line 10 the word "substantially" has been inserted. Section 43 of the Act of 1832, 1 Purd. 1072, reads: "No immaterial variation from the forms given and prescribed in and by this act, shall vitiate or render void any proceedings in which said forms shall be used." The form in the present section is the only one included in this draft, and it therefore seems unnecessary to re-enact Section 43, the word "substantially" being intended to have the same effect.

SECTION 18. Where a caveat is entered against the probate of any last will or testamentary paper, or where there is a dispute as to such probate or as to the granting of letters testamentary or of administration, the orphans' court of the county in which said will or testamentary paper has been offered for probate or said letters testamentary or of administration have been applied for, may, by general rule or by special order in the case, on the petition of the register of wills of said county or of any party interested, direct said register to certify the entire record thereto pertaining to said court, which shall then determine whether the will or testamentary paper shall be admitted to probate or an issue devisavit vel non be directed to the court of common pleas of said county, or whether said letters testamentary or of administration shall be granted, in like manner as if the said will or testamentary paper had been admitted to probate, or said letters testamentary or of administration had been granted, by said register and an appeal been taken to the orphans' court from his decree. The record may be thus certified at any stage of the proceedings before the register, and after its removal to the orphans' court no letters of administration pendente lite shall be granted by the register except by leave of the orphans' court on cause shown by any party interested.

NOTE.—This is a new section, intended to prevent the needless and sometimes intentional delays which have often occurred in the prosecution of proceedings before registers.

SECTION 19. Where objections are made, or a caveat is entered, against the probate of any last will and testament, and no precept for an issue is directed by the register into the court of common pleas as aforesaid, or where objections are made to the granting of letters testamentary or of administration to any person applying therefor, or where any question of kindred or other disputable and difficult matter comes into controversy before any register, he may certify the entire record thereto pertaining to the orphans' court of the county, for the determination by said court of such disputable and difficult matter, giving convenient notice of the time when the matter will be heard in said court to all persons interested.

NOTE.—This is founded on Section 25 of the Act of March 15, 1832, 4 Purd. 4081, which provided for the appointment of a register's court to determine such matters. It has been held that the section was not repealed by the abolition of registers' courts by the constitution of 1874, and that such matters are now to be certified to the orphans' court: Com. *vs.* Clark, 1 W. N. C. 330. The section has been revised accordingly.

The draft, instead of providing that the register "shall, at the request of any person interested, certify the entire record," etc., provides that the register *may* certify the record and omits the provision as to request by a person interested. The last preceding section of the draft provides a method for the compulsory removal of the record, and it seems best to make the certification under the present section discretionary with the register.

In the provision as to notice, the words "by citation or otherwise," following "said court," and the words "and to the judges of said court," after "persons interested," and, at the end, the words, "and in the meantime, he shall do and receive all proper acts preparatory to the business of said court," have been omitted as being inappropriate since the abolition of the register's court.

Section 20 (*a*) It shall not be lawful for any register of wills, having jurisdiction of the probate of wills and the granting of letters testamentary and of administration within this commonwealth, to entertain, consider or regard any caveat against the probate of any last will and testament, or the granting of letters testamentary or of administration, or any appeal from the probate of any such will, or from the grant of any letters testamentary or of administration, unless such caveator or caveators, appellant or appellants, shall, within ten days after the filing of such caveat or appeal, enter into a bond, in the name of the commonwealth of Pennsylvania, with at least two sufficient sureties to be approved by the register, in a penal sum of not less than five hundred dollars and not to exceed five thousand dollars, as may be determined by the said register, conditioned for the payment of all or any costs which may be occasioned by reason of such caveat or appeal, and which may be decreed by such register or by the orphans' court to be paid by such caveator or appellant, which bond shall remain on file in the office of such register.

Note.—This is Section 1 of the Act of June 6, 1887, P. L. 359, 4 Purd. 4086.

(*b*) In case no bond, such as aforesaid, shall be filed with the register within ten days after the filing of any caveat or appeal, as aforesaid, such caveat or appeal shall be considered as abandoned, and shall be dismissed, and proceedings may be had in all respects as if no such caveat or appeal had been filed.

Note.—This is Section 2 of the Act of June 6, 1887, 4 Purd. 4087, the only change being to substitute "respects" for "cases" in the next to the last line.

(*c*) Such registers of wills and the orphans' court of the proper county, in all cases of appeal from the decree of the register, shall have power, and they are hereby directed, in all cases which may be instituted or adjudicated before them or any of them, and in all proceedings

which may be had upon or by reason of any such caveat or appeal, to determine what amount of costs has been incurred or occasioned by the proceeding, and to direct by whom such costs shall be paid; and when such costs or any part thereof shall be finally adjudged and decreed to be paid by any caveator or appellant, as aforesaid, any party to whom such costs are due and payable, or who may have advanced money to pay the same as the proceedings shall have progressed, may institute an action in the proper court upon such bond for his own benefit, or that of all other parties interested, and may proceed thereon to final judgment and execution, if the same shall be necessary, as in other cases.

NOTE.—This is Section 3 of the Act of June 6, 1887, 4 Purd. 4087, modified by changing the word "direct" to "determine" in line 7, and by omitting after that word, "in the final order or judgment he or they shall make in each case."

(*d*) All the orders and decrees of the said register of wills relating to the amount and sufficiency of the security to be required by this section and to the taxation of costs in proceedings upon caveats and appeals before him, as aforesaid, shall be subject to the right of appeal to the orphans' court of the proper county by or on behalf of any and every person, who may appear or have appeared before him as litigants, or who may be affected by such order or decree.

NOTE.—This is Section 4 of the Act of June 6, 1887, 4 Purd. 4087, except that, in line 3, "section" is substituted for "act," and "taxation" for "disposition," and, at the end, "or decree" is substituted for "of appeal," the latter words having apparently been used in the Act of 1887 by mistake.

SECTION 21 (*a*) From all the judicial acts and proceedings of the several registers, including all decisions granting an issue devisavit vel non in a contest concerning the validity of a will, appeals may be taken to the orphans'

court of the respective county within the term of two years: *Provided*, That any party entitled to appeal may be cited by such court to show cause why he should not appeal within six months from the date of such citation, and, on the failure of such party to show cause, said court may make an order limiting the time for such appeal by said party to said period of six months.

NOTE.—This is founded on Section 31 of the Act of March 15, 1832, 4 Purd. 4082, which was derived from Section 2 of the Act of September 30, 1791, 3 Sm. L. 58.

It is now modified as follows: The provision of the Act of February 28, 1905, P. L. 26, 6 Purd. 7298, allowing an appeal from the granting by the register of an issue devisavit vel non, is incorporated; the reference to a register's court is omitted; the period for appeal is reduced from three years to two; and the proviso is added to cover cases where parties entitled to appeal delay unreasonably in doing so.

(*b*) No appeal from any decree of the register, concerning the validity of a will or the right to administer, shall suspend the powers or prejudice the acts of any executor or administrator to whom letters have been granted.

NOTE.—This is founded on a part of Section 42 of the Act of March 15, 1832, 4 Purd. 4092, which relates to appeals from the register's (orphans') court, and is considered in the draft of the new Orphans' Court Act.

SECTION 22. In counties wherein separate orphans' courts are now or may be established, the said courts shall establish a bill of costs to be chargeable to parties and to estates, for the probate of wills and testaments, and granting of letters testamentary and of administration, and for all the services of the register of wills of such county in the transaction of the business of his office: *Provided*, That the tax to be paid to and received by the register for the use of the commonwealth shall not be less than the sum now or hereafter fixed by law: *And provided further*, That in counties wherein no separate

orphans' courts have been or shall be established, the law as to fees to be charged by registers of wills shall remain as heretofore.

NOTE.—This is Section 1 of the Act of March 24, 1877, P. L. 37, 2 Purd. 1651 and 4 Purd. 4081.

The second proviso has been added in order to show that it is not the intention of the present draft to deal with the subject of fees and salaries of registers now regulated by Section 7 of the Act of April 2, 1868, P. L. 10, 2 Purd. 1650, Section 37 of the Act of March 15, 1832, P. L. 145, or local acts.

The Commissioners have considered it best not to attempt to include this subject or the subjects of the appointment of clerks, stenographers, etc., and their salaries.

SECTION 23. Whenever any proceedings before a register shall be wholly ended, and the fees and costs accrued thereon shall remain, during the space of thirty days thereafter, due and unpaid, such register may file a bill thereof, under his hand and the seal of his office, in the orphans' court of the county; and upon the docketing thereof, an execution may be issued in the name of the commonwealth, to levy the amount of the said bill, in like manner as executions may issue out of the orphans' court to enforce payment of decrees of that court for the payment of money.

NOTE.—This is Section 38 of the Act of March 15, 1832, 4 Purd. 4081, which was new in that act. In the second line, "or register's court" is omitted after "register."

In line 6 "orphans' court" is substituted for "common pleas," it seeming more appropriate that the remedy should be in the former court.

SECTION 24. On the probate of any will, and the granting of letters testamentary thereon, also on the granting of any letters of administration, every register shall demand and receive for the use of the commonwealth, in each case, the sum of fifty cents.

NOTE.—This is Section 36 of the Act of March 15, 1832, 4 Purd. 4081, which was stated by the Commissioners to have been derived from Section 5 of the Act of April 6, 1830, P. L. 272. The latter section is printed in 4 Purd. 4595. The repeal of Section 5 of the Act of 1830 is recommended.

SECTION 25. This act shall be known and may be cited as the Register of Wills Act of 1917.

SECTION 26. The following acts and parts of acts of assembly are hereby repealed as respectively indicated. The repeal of the first section of an act shall not repeal the enacting clause.

Sections 1, 2, 5 and 8 of an act entitled "An Act concerning the probates of written and nuncupative wills, and for confirming devises of lands," passed 1705, 1 Sm. L. 33, absolutely.

Sections 14, 15 and 16 of an act entitled "An Act for establishing orphans' courts," passed March 27, 1713, 1 Sm. L. 81, absolutely.

An act entitled "An Act for establishing in the city of Philadelphia, and in each county of this state, an office for the probate and registering of wills, and granting letters of administration, and an office for the recording of deeds," passed March 14, 1777, 1 Sm. L. 443, in so far as it relates to registers of wills.

Section 5 of an act entitled "An Act to confer on certain associations of the citizens of this commonwealth the powers and immunities of corporations, or bodies politic in law," passed April 6, 1791, 3 Sm. L. 20, absolutely.

Section 2 of an act entitled "A Supplement to the act, entitled 'An act to establish the judicial courts of this commonwealth, in conformity to the alterations and amendments in the constitution,'" passed September 30, 1791, 3 Sm. L. 58, absolutely.

Section 5 of an act entitled "An Act for the levy and collection of taxes upon proceedings in courts, and in the offices of register and recorder, and for other purposes," approved April 6, 1830, P. L. 272, absolutely.

Sections 1 to 5 inclusive, 7 to 13 inclusive, 17, 25, 31, 32, 36, 38, 39, 42, and 43 of an act entitled "An Act relating to registers and registers' courts," approved March 15, 1832, P. L. 135, absolutely.

Section 10 of an act entitled "An act supplementary to an act passed the twenty-ninth day of March, one thousand eight hundred and thirty-two, entitled 'An Act relating to orphans' courts,' and relating to contracts of decedents and escheats in certain cases, and relative to the district court of the City and County of Philadelphia, and to registers of wills," approved April 3, 1851, P. L. 305, absolutely.

Sections 4 and 5 an act entitled "An Act for the preservation of the records of the courts," approved April 19, 1856, P. L. 458, absolutely.

Section 7 of an act entitled "An Act for the greater certainty of title and more secure enjoyments of real estate," approved April 22, 1856, P. L. 532, absolutely.

An act entitled "An Act relating to the fees and official bond of the register of wills in counties wherein separate orphans' courts are or may be hereafter established," approved March 24, 1877, P. L. 37, absolutely.

An act entitled "An Act to provide for the recording of inventories and appraisements of decedents estates by the register of wills," approved June 24, 1885, P. L. 155, absolutely.

An act entitled "An Act to authorize registers of wills and orphans' courts to require security for costs, and to apportion costs in cases of caveats and appeals," approved June 6, 1887, P. L. 359, absolutely.

An act entitled "An Act to provide for the recording of exemplifications of wills relating to real estate in the office of the register of wills for any county of this commonwealth, in which said real estate is situate, and giving to the records of such exemplifications the same effect as the original wills or their duly certified copies or their records," approved April 23, 1889, P. L. 48, absolutely.

An act entitled "An Act requiring all public records within this commonwealth to be kept in the English

language," approved May 31, 1893, P. L. 188, in so far as it relates to wills and other instruments offered for probate or recording in the office of the register of wills.

An act entitled "An Act amending section seven of an act, entitled 'An Act for the greater certainty of title and more secure enjoyments of real estate,' approved twenty-second day of April, Anno Domini one thousand eight hundred and fifty-six, relating to the time when the probate or refusal to probate a will shall be conclusive as to realty," approved June 25, 1895, P. L. 305, absolutely.

An act entitled "An Act authorizing appeals to orphans' courts from decisions of registers of wills, granting issues *devisavit vel non* in cases of contested wills," approved February 28, 1905, P. L. 26, absolutely.

An act entitled "An Act providing that the last will of any decedent, to be effective against *bona fide* conveyances or mortgages of the real or personal estate of the decedent, must be offered for probate within three years from the date of the death of the testator, or before the date of the recording of such conveyance or mortgage," approved April 1, 1909, P. L. 79, absolutely.

An act entitled " An Act to amend the second section of an act, approved the twenty-fourth day of March, Anno Domini one thousand eight hundred and seventy-seven, entitled 'An Act relating to the fees and official bond of the register of wills, in counties wherein separate orphans' courts are or may be hereafter established,' by removing the restriction as to population of the counties affected by the act," approved April 27, 1911, P. L. 87, absolutely.

All other acts of assembly, or parts thereof, that are in any way in conflict or inconsistent with this act, or any part thereof, are hereby repealed.

ORPHANS' COURT ACT.

TABLE OF CONTENTS.

PAGE

SECTION 1. Organization of court 391
(a) Court to continue to exist in each county 391
(b) Separate orphans' courts in certain counties; judges, their election, commissions and salaries 391
(c) Composition of orphans' court where not separate 392
(d) President judge of separate orphans' court 393
1. Senior judge; drawing lots 393
2. Where only one judge 393
3. Re-election 393
4. Where two or more judges are elected at same election 393

SECTION 2. Court to be a court of record; proceedings not to be collaterally attacked 394

SECTION 3. Calling in judges of other districts when judge of district is unable to sit 394
(a) Power to call in other judge 394
(b) Compensation and carfare 395

SECTION 4. Common pleas judges sitting in separate orphans' court 395
(a) Power to act 395
(b) Not compelled to act 395
(c) When president judge absent or disabled, other judge may call in common pleas judge 396
(d) Mileage and expenses 396

SECTION 5. Orphans' court judges sitting in courts of common pleas or criminal courts 396
(a) Power to act 396
(b) Not compelled to act 397
(c) When president judge absent or disabled, other judge may call in orphans' court judge 397
(d) Mileage and expenses 397

SECTION 6. Seal of court 398

SECTION 7. Court rooms 398

SECTION 8. Clerk of court 398
(a) Register of wills to be clerk in counties having separate orphans' court; other counties 398

PAGE

(*b*) Duties of clerk ... 399
1. Custody of records; duties in general ... 399
2. Dockets; records of accounts and auditors' reports ... 399
3. Translations of papers in other than English language ... 400
(*c*) Bill of costs ... 400

SECTION 9. Jurisdiction ... 401
(*a*) Guardians ... 401
(*b*) Trustees ... 401
(*c*) Trustees durante absentia ... 401
(*d*) Executors and administrators ... 402
(*e*) Distribution of decedents' estates ... 402
(*f*) Sale of real estate for payment of debts of decedents ... 402
(*g*) Disposition of title to real estate to render the same freely alienable, etc ... 402
(*h*) Partition ... 402
(*i*) Specific execution of decedents' contracts as to real estate ... 402
(*j*) Legacies ... 403
(*k*) Discharge of liens and charges ... 403
(*l*) Where executors, administrators, guardians or trustees are possessed of, or accountable for estate of decedent 403
(*m*) Appeals and proceedings certified from registers of wills 403
(*n*) Incidental and additional powers ... 403

SECTION 10. Rules of court ... 404

SECTION 11. Time of holding court ... 404

SECTION 12. Notice to parties ... 404
(*a*) In general ... 404
(*b*) Publication ... 405

SECTION 13. Attestation of process, etc ... 406

SECTION 14. Return-days of process ... 406

SECTION 15. Proceedings in vacation ... 406

SECTION 16. Injunctions ... 406

SECTION 17. Proceedings to obtain appearance; citations; procedure in default of appearance ... 407
(*a*) Awarding citation ... 407
(*b*) By whom to be served ... 407
(*c*) Manner of service ... 407
(*d*) Place of service ... 407
(*e*) Service on sureties ... 408
(*f*) Return of service ... 408
(*g*) Alias and pluries citations ... 408

PAGE
(*h*) Order of publication on award of alias or pluries citation 409
(*i*) Default of appearance..... 409
1. Power of court to proceed..... 409
2. Method of proceeding..... 409

SECTION 18. Proceedings to compel obedience to orders and decrees.. 410
(*a*) Modes of enforcing orders and decrees..... 410
1. Attachment of the person..... 410
2. Sequestration..... 410
3. Fi. fa. 410
4. Attachment execution..... 411
5. Testatum fi. fa..... 411
(*b*) Procedure on attachment or sequestration..... 412
1. Direction of writs..... 412
2. Issuance of process to other counties..... 412
3. Form of writ of sequestration..... 412
4. Sequestration not to abate on death of party.... 413
5. Filing copy of writ of sequestration in prothonotary's office..... 413
6. Issuance of attachment or sequestration where party absconds 414
7. Dissolution of attachment or sequestration..... 414
8. Discharge of persons attached as for contempt... 415
9. Procedure where party is wasting trust property or is about to abscond..... 415
10. Enforcement of final order and decree for delivery of trust property..... 416
11. Order as to final disposition of trust property.. 416
12. Decree in sequestration proceedings when party does not appear; security by complainant... 416
13. Re-opening of such decree..... 417
14. Failure of respondent to apply for re-opening.... 417
(*c*) Process to recover fines, forfeitures and amercements.. 417
(*d*) Direction of, and procedure on, writs of fi. fa..... 417
(*e*) Transcripts to the common pleas of orders upon parties other than fiduciaries to pay money..... 418
1. Filing transcripts and effect thereof; executions. 418
2. Satisfaction and discharge of judgments on transcripts..... 419

SECTION 19. Fees of sheriff; mileage; postage..... 419

SECTION 20. Witnesses and evidence..... 420
(*a*) Subpœnas..... 420
(*b*) Methods of taking testimony..... 420
1. In general..... 420

PAGE

2. Depositions of aged, infirm and going witnesses; commissions and letters rogatory 421
3. Oral depositions outside of state 421
(c) Production of books and papers 422
(d) Perpetuation of testimony 422
(e) Testimony in proceedings removed from register of wills 422
1. What testimony to be basis of decision 422
2. Testimony taken in orphans' court to be reduced to writing 423

SECTION 21. Issues to the common pleas 423
(a) In general 423
(b) In proceedings removed from register of wills 423
(c) On distribution of proceeds of sales of real estate 425
1. Affidavit 425
2. Investment of fund pendente lite 426

SECTION 22. Appeals 426
(a) Right of appeal; effect of appeal 426
(b) Disposition of cases on appeal 427

SECTION 23. Short title section 427

SECTION 24. Repealer 427

AN ACT

Relating to the organization, jurisdiction and procedure of the orphans' courts, the powers and duties of the judges thereof, and appeals therefrom.

SECTION 1 (*a*) Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That in every county of this commonwealth, there shall continue to exist, as heretofore, a court of record, the name and style whereof shall be "The Orphans' Court of (the respective) County."

NOTE.—This is founded on Section 1 of the Act of May 19, 1874, P. L 206, 3 Purd. 3360, which provides that such court shall be "organized and holden, on and after the first Monday of January, 1875." It is recommended that said section be not repealed.

(*b*) In the counties of Philadelphia, Allegheny, Luzerne, Berks, Schuylkill, Westmoreland, Montgomery, Lancaster, Lackawanna and Fayette, the orphans' court shall be a separate court of record, which shall consist, in the county of Philadelphia, of five judges learned in the law, any one of whom may hold the said court, and hear and determine all matters and things therein cognizable, in the county of Allegheny of three judges learned in the law, any one of whom may hold the said court and hear and determine all matters and things therein cognizable, and in the counties of Luzerne, Berks, Schuylkill, Westmoreland, Montgomery, Lancaster, Lackawanna and Fayette, each, of one judge learned in the law; and the said judges shall be elected at the same elections, and be commissioned for the same term and in the same manner as the judges of the courts of common pleas of the respective counties where separate orphans' courts are or shall be established. In the counties where separate orphans' courts are or shall be established, the annual salaries of said judges shall be the same as are paid to the judges of the courts of common pleas in the respective counties where such orphans' courts are or shall be established, to be paid in

the same manner as the salaries of said judges of the courts of common pleas are now, or may be by law, payable.

NOTE.—This is Section 3 of May 19, 1874, P. L. 296, 3 Purd. 3360, as amended by the Act of June 13, 1883, P. L. 91, further amended so as to conform to the subsequent legislation establishing separate orphans' courts in counties other than Philadelphia, Allegheny and Luzerne, by adding, in two places, after "hold the said court," the words, "and hear and determine," etc., and by altering the provision that the judges shall be elected "at the next general election."

Separate orphans' courts have been established as follows: Berks County, by Act of June 13, 1883, P. L. 97; Schuylkill County, by Act of March 28, 1895, P. L. 31; Westmoreland County by Act of April 11, 1901, P. L. 71; Montgomery County, by Act of May 2, 1901, P. L. 117; Lancaster County, by Act of July 11, 1901, P. L. 655; Lackawanna County, by Act of July 11, 1901, P L. 657; and Fayette County, by Act of May 25, 1907, P. L. 260.

The Act of 1874 provided for three judges in Philadelphia County. The Act of April 28, 1887, P. L. 72, 3 Purd. 3361, provided for an additional judge, and the Act of March 22, 1907, P. L. 26, 6 Purd. 7034, provided for a fifth judge.

The Act of 1874 provided for one judge in Allegheny County. The Act of May 5, 1881, P. L. 12, added another judge, and the Act of July 18, 1901, P. L. 669, added a third.

These acts are not recommended for repeal.

(*c*) The orphans' court of each county, except in the counties where separate orphans' courts are or shall be established by law, shall be composed of the judge or judges, when there are more than one, of the court of common pleas thereof; but any one judge learned in the law shall have power to hold the court, and hear and determine all matters and things therein cognizable.

NOTE.—This is Section 2 of the Act of May 19, 1874, P. L. 206, 3 Purd. 3360, except that, in lines 2 and 3, the words beginning with "where" and ending with "law" have been substituted for "of Philadelphia, Allegheny and Luzerne."

The repeal of the Act of April 7, 1876, P. L. 19, 3 Purd. 3725, is recommended, so far as it relates to the orphans' court, since the above provisions of the Act of 1874 cover the matter.

(*d*) 1. In all counties in which there is or hereafter may be established a separate orphans' court, the governor shall issue a commission as president of said court, to the judge of said court, who shall be the oldest in commission and continuous service; and if there shall be two or more judges of any of said courts, whose commissions are of the same date, and whose term of service commenced at the same time, they shall draw lots for a commission as president of said court, and certify the result to the governor, who shall issue a commission as president of said court to the judge who shall draw the right to receive the same.

NOTE.—This and the following paragraphs of the present clause are copied from Sections 1 to 4 of the Act of May 24, 1878, P. L. 131, 3 Purd. 3361.

2. In all separate orphans' courts, composed of only one judge, he shall be styled the president judge of said court, and be commissioned as such.

3. When the president judge of any of said courts shall be re-elected, he shall be again commissioned as, and continue to be the president judge of said court; and when the said president judge shall go out of office, the judge of said court who shall be oldest in commission and continuous service shall be commissioned as, and be the president judge thereof.

NOTE.—In this clause, the word "as" has been inserted after "commissioned" in two places.

4. Whenever, at any election, two or more judges of any of said courts are elected, who shall not have been commissioned and served as judges of said court immediately before the commencement of the terms for

which they were elected, they shall draw lots for priority of commission, and certify the result to the governor, who shall issue the commissions of said judges on different days, giving the priority of commission to the judge drawing the right to receive the same.

NOTE.—In this clause, the word "general" is omitted before "election" in the first line.

SECTION 2. The orphans' court of each county, whether separate or otherwise, is hereby declared to be a court of record, with all the qualities and incidents of a court of record at common law. Its proceedings and decrees, in all matters within its jurisdiction, shall not be reversed or avoided collaterally in any other court; but they shall be liable to reversal, modification or alteration on appeal.

NOTE.—This is Section 2 of the Act of March 29, 1832, P. L. 190, 3 Purd. 3360, altered by inserting in lines 1 and 2 the words "of each county, whether separate or otherwise," and by omitting, at the end, the words "to the supreme court, as hereinafter directed."

SECTION 3 (*a*) Whenever, by reason of sickness, absence, interest or other cause, a judge of any separate orphans' court, or a judge of the court of common pleas in a judicial district having no separate orphans' court, may be unable to sit in any matter depending in the orphans' court of such district, and there shall be no other judge of the orphans' court or of the court of common pleas of such district available for the purpose, it shall be lawful for said judge to call upon any judge of a separate orphans' court of any other judicial district of this commonwealth, or any judge of the court of common pleas of any other judicial district having no separate orphans' court, to preside in and determine such matter, with the same force and effect as he, the regular commissioned judge of such district, if presiding, might do.

NOTE.—This is Section 1 of the Act of March 4, 1875, P. L. 5, 3 Purd. 3372, modified so as to apply in all cases, thus meeting the decision in Livingston's Appeal, 88 Pa.

209, that the Act of 1875 applied only to counties having separate orphans' courts, and that a judge of such a court could not be called in to sit in a county having no separate orphans' court, where the orphans' court must be held by a common pleas judge.

The new section is intended to supply not only the Act of 1875, but also, so far as the orphans' court is concerned, Section 8 of the Act of April 4, 1843, P. L. 133, 3 Purd. 3371, extending to the orphans' court and the criminal courts the provisions of Sections 37–41 of the Act of April 14, 1834, P. L. 349, 1 Purd. 632.

(*b*) Such judge of another judicial district called in as provided by clause (*a*) of this section shall be entitled to receive as compensation for so presiding, the sum of twenty dollars a day and carfare, and no more. No payment shall be made for any day consumed in such service of more than expenses and carfare, unless said judge, so assigned, actually presides in open court on such day.

NOTE.—This is modeled upon part of Section 5 of the Act of April 27, 1911, P. L. 101, 5 Purd. 5540, relating to judges of the courts of common pleas.

SECTION 4 (*a*) The judges of the court of common pleas of any judicial district having a separate orphans' court shall, when called upon by the president judge of such separate orphans' court, as hereinafter provided, have power to hear and determine, when certified according to the provisions of clause (*b*) of this section, all matters, causes and things whatsoever, in such separate orphans' court, so fully and effectually, and to dispose thereof in the same manner, as may be done by the judges of said separate orphans' court sitting therein.

NOTE.—This and the following clauses of this section are copied, with slight changes in phraseology, from Sections 1 to 4 of the Act of April 21, 1915, P. L. 156, 5 Purd. 5541. Section 5 is a general repealer. In clause (*d*) the provision as to mileage and expenses has been added to conform to the Act of 1913, Section 5 (*d*), infra.

The Act of 1915 is recommended for repeal.

(*b*) Nothing in this section shall be construed to make it compulsory upon the judges of said court of common

pleas to render the services aforesaid; but whenever the proper despatch of business requires it, and an arrangement can be made with a judge of such court of common pleas for such service, the president judge of the separate orphans' court of the said district may certify all matters to be heard and determined by such judge of the court of common pleas, specially presiding as aforesaid.

(*c*) In judicial districts having more than one judge of the separate orphans' court, whenever the president judge of such court shall be absent from the district or disabled by sickness, and occasion shall occur, it shall be competent for the judge next oldest in commission, being then in the district and able to act, to arrange for the services herein provided for, and to make the necessary certificates in like manner and to the same intent, effect, and purpose as the same could be done by the said president judge.

NOTE.—The words "and able to act" have been inserted.

(*d*) No additional compensation shall be received by said judges of the court of common pleas for any service rendered in pursuance of this section; but they shall be entitled to be paid such mileage and other actual expenses as are provided by law for judges of this commonwealth when holding court outside of the district for which they shall have been commissioned.

SECTION 5 (*a*) In addition to the powers now possessed and exercised by the judges of the separate orphans' courts of this commonwealth, said judges shall, when called upon by the president judge of the court of common pleas of the same judicial district, as hereinafter provided, have power to hear and determine, when certified according to the provisions of clause (*b*) of this section, all pleas, actions, causes, civil or criminal issues, and all issues and other matters in equity, in the court of common pleas, court of oyer and terminer and general jail delivery, and court of quarter sessions of the peace,

for said judicial district, so fully and effectually, and to dispose thereof in the same manner, as may be done by the judges of the court of common pleas sitting in said courts.

NOTE.—This and the following clauses of the present section are copied, with slight changes in phraseology, from Sections 1 to 4 of the Act of July 19, 1913, P. L. 844, 6 Purd. 7036. Section 5 is a general repealer.

The provisions of the Act of April 18, 1905, P. L. 208, 6 Purd. 7035, which related only to equity proceedings, are incorporated by the insertion of the words "and all issues and other matters in equity."

Both acts are recommended for repeal.

(*b*) Nothing in this section shall be construed to make it compulsory upon the judges of said orphans' courts to render the services aforesaid; but whenever the proper despatch of business requires it, and an arrangement can be made with a judge of such orphans' court for such service, the president judge of the court of common pleas of the same judicial district may certify all matters or issues to be heard and determined by such orphans' court judge, specially presiding as aforesaid.

(*c*) In districts having one or more additional law judges, whenever the president judge shall be absent from the district, or disabled by sickness, and occasion shall occur, it shall be competent for the additional law judge, and in districts having more than one additional law judge, for the one oldest in commission, being then in the district and able to act, to arrange for the service herein provided for, and to make the necessary certificates in like manner, and to the same intent, effect and purpose, as the same could be done by the said president judge.

NOTE.—In this clause, "shall" has been substituted for "should" in line 4, and "one" for "an" before "additional law judge" in line 5. The words "and able to act" have been inserted.

(*d*) No additional compensation shall be received by the said orphans' court judges for any service rendered

in pursuance of this section; but they shall be entitled to be paid such mileage and other actual expenses as are provided by law for judges of this commonwealth when holding court outside of the district for which they shall have been commissioned.

SECTION 6. Every orphans' court shall have a seal for the use of the said court, having engraved thereon the same device as is engraved on the great seal of the State, together with the name of the respective court; and such seal may be renewed, under the direction of such court, as often as occasion shall require.

NOTE.—This is a combination of Section 55 of the Act of April 14, 1834, P. L. 351, 3 Purd. 3361, which, however, provides that the seal shall have engraved upon it "such words and devices as are inscribed on the seal now in use in the respective court," and Section 1 of the Act of March 6, 1854, P. L. 156, 3 Purd. 3338. Both sections are recommended for repeal, the latter only so far as it relates to the orphans' court.

SECTION 7. The commissioners of the several counties wherein separate orphans' courts are now or hereafter shall be established shall provide proper and suitable apartments, as may be required by said courts, in which the business of said courts shall be held and conducted, and in which the records thereof shall be safely and securely kept.

NOTE.—This is Section 10 of the Act of May 19, 1874, P. L. 207, 3 Purd. 3362, modified by inserting the words, "as may be required by said courts."

SECTION 8 (*a*). The register of wills of each county in which a separate orphans' court is now or hereafter shall be established shall be clerk of such court and subject to its directions in all matters pertaining to his office; and he may appoint an assistant clerk or clerks, but only with the consent and approval of said court.

In each county having no separate orphans' court, a clerk of the orphans' court shall be elected and commissioned in accordance with the existing law.

NOTE.—This is copied from the first part of the Act of March 31, 1915, P. L. 41, 6 Purd. 7034, relating to counties having more than 150,000 inhabitants, and the Act of April 25, 1889, P. L. 52, 3 Purd. 3362, relating to counties having less than that population.

The other parts of those acts relate to salaries and fees—subjects which have been excluded from the present draft, and it is not recommended that said acts be repealed.

The last sentence has been added because the Commissioners considered it inadvisable in the present draft to attempt to deal with the local provisions of the Act of July 2, 1839, P. L. 559, 3 Purd. 3664 and its amendments.

(*b*) 1. In each county of this commonwealth, the clerk of the orphans' court shall have the custody of the records and of the seal of the respective court, and keep the same at the place of holding such court, and in the apartments provided by law for that purpose; and he shall faithfully perform, under the direction of the court, all the duties appertaining to his office.

NOTE.—This is founded on Section 56 of the Act of April 14, 1834, P. L. 351, 3 Purd. 3361. The first part of that section, reading, "A clerk shall be commissioned for each of the said courts," is sufficiently covered by clause (*a*) supra.

2. Said clerks are hereby authorized and required to keep, in dockets provided for the purpose, a full record of all proceedings of their respective courts, and place upon record, in a fair, legible hand, or in typewriting, in a book or books to be provided for that purpose, all accounts of executors, administrators, guardians and trustees, as well as all reports of auditors appointed by said courts, respectively, omitting the testimony and documents accompanying the same; the fees for this service to be one-half of the amount now allowed by law for the recording of deeds.

NOTE.—This is Section 18 of the Act of April 25, 1850, P. L. 572, 1 Purd. 1126, with the addition of the provision as to dockets, and of the words "trustees" and "or in typewriting."

3. Any person who shall offer any written or printed instrument to be filed in any orphans' court or in the office of the clerk of any orphans' court, which instrument shall be in any other than the English language, shall furnish at his own expense, to the clerk of such court, a sworn translation in English of such instrument thus offered, and the clerk shall attach or cause to be attached such translation to the original and file both the original and the translation of record in his office in all cases where filing is now or hereafter may be required by law, but in all cases where recording is now, or hereafter may be, required, both the original and the translation in English shall be recorded. Such clerk shall not file or mark filed, record or mark recorded, any written or printed instrument in violation of this clause, nor shall any paper filed or recorded in violation of this clause be notice to any person in any legal proceeding whatever, nor be received or considered in evidence in any proceeding at law or in equity.

NOTE.—This is founded on Sections 1 and 2 of the Act of May 31, 1893, P. L. 188, 4 Purd. 4052–3, which relates to the register and recorder and to all courts of record.

(*c*) The separate orphans' courts of this commonwealth may establish a bill of costs to be chargeable to parties and the estates before them for settlement, for the services of the clerks of said courts, respectively, in the transaction of business of said courts. In counties wherein no separate orphans' courts have been or shall be established, the law as to fees to be charged by clerks of the orphans' courts shall remain as heretofore.

NOTE.—The first sentence is the last part of Section 1 of the Act of March 18, 1875, P. L. 29, 3 Purd. 3370, with the substitution of "may" for "shall."

The second sentence has been added because the Commissioners considered it inadvisable to disturb the existing system. See 2 Purd. 1630.

SECTION 9. The jurisdiction of the several orphans' courts, whether separate or otherwise, shall extend to and embrace:

(*a*) The appointment, control, removal and discharge of the guardians of minors, and the settlement of their accounts:

NOTE.—This and most of the following clauses of this section are founded upon Section 19 of the Act of June 16, 1836, P. L. 792, 3 Purd. 3362–9. The changes and additions are noted under the particular clauses.

Section 19 of the Act of 1836 supplied Section 4 of the Act of March 29, 1832, P. L. 190, and enlarged the jurisdiction there given.

In the present clause, the provisions of Section 6 of the Act of May 19, 1874, P. L. 207, 3 Purd. 3369, have been incorporated, omitting, however, the reference to "registers' courts."

(*b*) The appointment of trustees for any persons interested in the real or personal estate of any decedent, and the control, removal, discharge and settlement of the accounts of trustees so appointed and of testamentary trustees, whether the testamentary trustees be appointed nominatim or virtute officii:

NOTE.—This clause is new, but is declaratory of the existing law.

(*c*) The appointment of trustees for absent persons, the control, removal and discharge of trustees so appointed, and the settlement of their accounts:

NOTE.—This clause is new, and is introduced to cover the jurisdiction under the Act of April 11, 1879, P. L. 21, 4 Purd. 4904, which is the basis of Section 60 of the Fiduciaries Act.

(*d*) The control, removal and discharge of executors and administrators, deriving their authority from the register of the respective county, and the settlement of their accounts:

(*e*) The distribution of the assets and surplusage of the estates of decedents among creditors and others interested:

(*f*) The sale of real estate of decedents for payment of their debts.

NOTE.—This is an amendment of Clause IV of Section 19 of the Act of June 16, 1836, 3 Purd. 3366, which reads "The sale of real estates of decedents." Other sales than those for payment of debts are covered by clauses (*g*) and (*h*).

(*g*) The disposition of the title to real estate of decedents and of persons disabled from dealing therewith in order to render the same freely alienable and productive to the living owners thereof:

NOTE.—This is a new clause, introduced to cover the provisions of the Price Act.

(*h*) The partition of the real estate of decedents among the parties entitled thereto, the valuation of such real estate, and the sale thereof for the purpose of distribution:

NOTE.—This is an amendment of Clause V of Section 19 of the Act of 1836, which reads: "The partition of the real estates of intestates among the heirs."

(*i*) The specific execution of contracts made by decedents to sell and convey any real estate of which such decedent shall die seised, and of contracts made by decedents to purchase any real estate:

NOTE.—This is Clause VI of Section 19 of the Act of 1836, amended so as to include contracts for the purchase of real estate.

(*j*) Proceedings for the collection or enforcement of payment or delivery of all legacies, whether pecuniary, specific or otherwise, and whether charged on real estate or not:

NOTE.—This is Clause VII of Section 19 of the Act of 1836, extended so as to cover specific legacies and legacies charged on land.

(*k*) Proceedings for the discharge of real estate of decedents from the lien of debts of decedents, and for the discharge of real and personal estate from the liens of legacies, annuities, dower, recognizances and other charges.

NOTE.—This is a new clause, added to cover branches of jurisdiction under the new Fiduciaries Act.

(*l*) All cases within their respective counties, wherein executors, administrators, guardians or trustees may be possessed of or are in any way accountable for any real or personal estate of a decedent.

NOTE.—This is Clause VIII of Section 19 of the Act of 1836.

(*m*) All appeals from the orders or decrees of the register of wills of their respective counties, and all proceedings removed from said registers by certification.

NOTE.—This clause is declaratory of the existing law.

(*n*) The exercise of all other powers needful to the doing of anything which is or may be hereafter required or permitted to be done in said court, whether incidental to the powers hereinbefore enumerated or in addition thereto.

And such jurisdiction shall be exercised under the limitations, and in the manner provided by law.

NOTE.—The first sentence of this clause is new, and is intended to remove any doubt as to the interpretation of this section when compared with the language of the other acts relating to the specific branches of the jurisdiction, and to obviate the necessity of amending this section in case of any future grant of new jurisdiction to the court.

The second sentence is the conclusion of Section 19 of the Act of 1836.

SECTION 10. The several orphans' courts shall have full power and authority to make, from time to time, such rules for regulating the practice thereof, respectively, and for expediting the determination of suits, causes and proceedings therein, as in their discretion they shall judge necessary or proper for the exercise of the powers hereby conferred or which may hereafter be conferred: *Provided*, That such rules shall not be inconsistent with the constitution and laws of this commonwealth.

NOTE.—This is a combination of part of Section 58 of the Act of March 29, 1832, P. L. 213, Section 21 of the Act of June 16, 1836, P. L. 792, and Section 9 of the Act of May 19, 1874, P. L. 207, all of which appear in 3 Purd. 3370.

SECTION 11. The orphans' courts of every county of this commonwealth shall be held during every term of the court of common pleas of the respective county and at such other times and as often as the judges thereof shall think necessary or proper.

NOTE.—This is intended to take the place of Section 57 of the Act of April 14, 1834, P. L. 352, 3 Purd. 3361, which reads as follows:—

"The orphans' courts of the city and county of Philadelphia shall be held during every term of the court of common pleas of the said city and county, at such time and as often as the judges thereof shall think necessary or proper; and the orphans' court of every other county of this commonwealth shall be held during the first week of each term of the court of common pleas of the respective county, and at such other times as the judges thereof shall think necessary or proper."

Section 4 of the Act of May 19, 1874, P. L. 207, 3 Purd. 3361, provides that, in Philadelphia, Allegheny and Luzerne Counties, the orphans' courts shall be held during every term of the courts of common pleas and at such other times and as often as the judges shall think necessary or proper.

SECTION 12 (*a*) In all cases in which heirs, legatees or distributees are interested, and in consequence of such interest, notice shall be required to be given to them or any of them, of any proceedings in the orphans' court,

such notice shall, except in the case of the accounts of executors or administrators, and in other cases specially provided for, be given in such manner, personally, by registered mail, or by publication, as shall appear to the court to be reasonable and proper, according to general rules adopted by the court, or special orders made by the court in particular cases.

NOTE.—This is founded on Section 52 of the Act of March 29, 1832, P. L. 207, 3 Purd. 3372, which, however, contains the following provisions as to the method of giving notice: "To all persons resident within the county in which the court has jurisdiction, notice shall be given personally, or by writing left at their place of abode; to all persons resident without the county, personal notice as aforesaid shall be given, if in the opinion of the court such notice be reasonably practicable; if otherwise, by publication in such one or more newspapers as, in the opinion of the court, will be most likely to meet the eye of those entitled to notice."

The change has been made in pursuance of the general view of the Commissioners that, except in cases of sales of real estate, the details as to the method of giving notice should be regulated by general rule of court or special order, rather than by inflexible statutory provisions.

Section 53 of the Act of March 29, 1832, 3 Purd. 3372, relating to the method of giving notices where minors are interested, is embodied, with changes, in Section 57 (*k*) of the new Fiduciaries Act.

(*b*) The judges of the respective orphans' courts shall have power, and are hereby authorized to make such rules and regulations as they may deem proper for the publication of advertisements of notices to parties in all cases within their jurisdiction: *Provided*, That said court shall have supervision of and regulate the cost of such publication in all cases, as well by special order in particular cases, as by general rules.

NOTE.—This is a part of Section 1 of the Act of March 18, 1875, P. L. 29, 3 Purd. 3370. The section also contains provisions as to notices of audits, of sales of real estate, and in partition proceedings, which are covered in their appropriate places in the proposed new acts, and a provision for the establishment of a fee bill, which is covered in Section 8 (*c*) of the present draft.

SECTION 13. All process, subpoenas, certificates, copies of records and other documents, which shall be issued out of any of said courts, shall be attested in the name of the president judge thereof alone.

NOTE.—This is Section 5 of the Act of May 24, 1878, P. L. 132, 3 Purd. 3370.

SECTION 14. The several orphans' courts shall have power to fix the return-days of all process issuing out of the respective courts, whenever such return-days are not otherwise provided for by law.

NOTE.—This is part of Section 58 of the Act of March 29, 1832, P. L. 213, 3 Purd. 3370, which was new in that act.

SECTION 15. The several orphans' courts of this commonwealth shall have full power in vacation to administer the business of the court and to issue process: *Provided*, That said process shall be made returnable only in the county where the proceeding is pending.

NOTE.—This is founded on Section 1 of the Act of May 7, 1889, P. L. 102, 3 Purd. 3371, which applies to "the law judges of the several courts of the commonwealth." "Administer the business of the court and issue process" has been substituted for "grant citations and rules to show cause," etc. In the proviso, the words "at a term of court" have been omitted after "returnable."

SECTION 16. The said courts shall have power to prevent, by orders in the nature of writs of injunction, acts contrary to law or equity, prejudicial to property over which they shall have jurisdiction: *Provided*, That security may be required as in other cases of writs of injunction.

NOTE.—This is Section 7 of the Act of May 19, 1874, P. L. 207, 3 Purd. 3370, except that the proviso to that section reads: "That security shall be given, as is now required by law in cases of writs of injunction."

SECTION 17. The manner of proceeding in the orphans' court, to obtain the appearance of a person amenable to its jurisdiction, and the procedure in default of appearance, shall be as follows:

(*a*) On petition to the court of any person interested, whether such interest be immediate or remote, setting forth facts necessary to give the court jurisdiction, the specific cause of complaint, and the relief desired, and supported by oath or affirmation, the orphans' court, or any judge thereof, may award a citation returnable at a day certain, not less than ten days after the issuing thereof.

NOTE.—This and the following clauses of this section, except where otherwise indicated in the notes, are founded on Section 57 of the Act of March 29, 1832, P. L. 207, 3 Purd. 3372–77.

In the present clause, the words "in vacation" are omitted after "judge thereof."

(*b*) Such citation may be served by the party obtaining the same, or by any authorized agent, or, if required by the party, it shall be served by the sheriff or coroner, as the case may require, of the proper county.

(*c*) The manner of service shall be by giving a copy thereof to the respondent personally, or by leaving such copy with some adult member of his family, at his place of residence.

NOTE.—In this, as in several subsequent clauses, "respondent" has been substituted for "defendant." The word "adult" has been inserted, and "residence" substituted for "abode."

(*d*) Such service may be made anywhere within this commonwealth; and if such party resides outside the commonwealth and his place of residence is known and the proceeding concerns property situate within the commonwealth, the court may, in its discretion, authorize service to be made on such party personally wherever found, or by registered mail, or may direct notice to be

given by publication in such manner as shall appear to the court to be reasonable and proper, according to general rules adopted by the court, or special orders made by the court in particular cases.

NOTE.—This is a new clause, intended to make citations operative throughout the state, and to provide for service outside the state in cases where the court has jurisdiction; Wallace *vs.* United Electric Co., 211 Pa. 473; Coleman's Appeal, 75 Pa. 441.

(*e*) If the respondent be not found, and have no known residence within the county, such citation may be served, in like manner, upon the person or persons who may be the surety or sureties of such party, in any bond or recognizance given by him for the performance of any trust or duty in respect to which such citation may have issued.

NOTE.—This is Clause IV of Section 57 of the Act of March 29, 1832, 3 Purd. 3374, the only changes being to substitute "respondent" for "defendant" in the first line, and "residence" for "dwelling place" in the second line.

The method of service here provided for does not meet the case of a respondent who has given no bond and who resides in or has removed to another state. Such a case is intended to be covered by the last preceding clause.

(*f*) The return to a citation, if made by the party on whose petition it issued, or his agent as aforesaid, shall be on oath or affirmation; and in all cases of service the return shall state how such citation was served.

(*g*) If the party to be cited cannot be found, and has no known residence, and there is no surety on whom service of the citation can be made as aforesaid, and the facts shall be so stated in the return on oath or affirmation, by the party complaining, or by some one competent to make affidavit in that behalf, the orphans' court may award another citation or pluries citations, returnable in like manner with the first.

NOTE.—This is Clause VI of Section 57 of the Act of 1832, except that the words "dwelling place within this commonwealth" are omitted and "residence" substituted, the case of a party having a known residence outside the state having been covered by clause (*d*) of this section, and that the words "or pluries citations" have been inserted.

(*h*) At the time of awarding such second or further citation, the court may make an order for publication of the same, in such place or places, and for such length of time, as the court, having regard to the supposed place of residence of the respondent, and other circumstances, shall direct.

NOTE.—This is Clause VII of Section 57 of the Act of 1832, inserting "or further" in line 1, omitting, after "the same," the words "in two or more newspapers, to be designated by the court," and changing "defendant" to "respondent" in line 5.

(*i*) 1. At the time appointed for the appearance of the respondent, should he not appear, according to the requisition of the citation, and if due proof be made of the service thereof, or, when service cannot be made, of the publication thereof, as hereinbefore prescribed, the court may, with or without another citation, as justice may require, proceed to make such order or decree in respect to the subject matter as may be just and necessary.

2. It shall be lawful for the court, on such proof, to order that the petition of the complainant be taken as confessed, and, in cases where there is personal service, to grant relief according to the prayer thereof. When there is no personal service the court shall, and when there is personal service the court may, in its discretion, hear testimony in support of the allegations of the petition, or direct a reference to a master or auditor to take proof of the facts and circumstances set forth in the petition, and to report thereon; and also to report an account against such respondent, if necessary. On the report of such master or auditor, the court shall make such order or decree as may be just and necessary.

NOTE.—This is a combination of clauses IX and X of Section 57 of the Act of 1832, 3 Purd. 3374–5, modified so as to make it discretionary with the court to enter a decree without testimony, to hear testimony itself, or to appoint a master. Clause IX as it now stands provides only for the appointment of an auditor.

Under the existing law, such a decree cannot be entered, even where there is personal service, without hearing witnesses: Shilling's Appeal, 1 Pa. 90.

SECTION 18 (*a*) Compliance with an order or decree of the court may be enforced:

1. By attachment of the person;

NOTE.—This and Clauses 2 and 3 are derived from Clause XI of Section 57 of the Act of 1832, with the addition of the words "of the person" after "attachment," and "of real or personal property" after "sequestration," and the omission, at the end, of the words "in vacation."

Section 8 of the Act of March 27, 1713, 1 Sm. L. 84, 3 Purd. 3375, which has been held to be still in force: Ex parte Batdorf, 13 W. N. C. 417, provides: "If any person or persons, being duly summoned to appear in any of the said orphans' courts, ten days before the time appointed for their appearance, shall make default, the justices may send their attachments for contempts, and may force obedience to their warrants, sentences and orders, concerning any matter or thing cognizable in the same courts, by imprisonment of body, or sequestration of lands or goods, as fully as any court of equity may or can do."

It is recommended that this section be repealed as covered by the present clause.

2. By sequestration of real or personal property;

3. In case of a decree for the payment of money, against a party who has appeared, the complainant may have a writ of execution in the nature of a writ of fieri facias against personal property only, which writ may be allowed by the court, or by any judge thereof.

NOTE.—This clause has been modified by inserting the words "against personal property only." See the note to paragraph 5, infra.

4. Whenever any person against whom a decree for the payment of money has been made by any orphans' court is possessed of or entitled to any stock, deposits or debts due him, or to any legacy or interest in the estate of a decedent, the same may be levied on or attached in satisfaction of such decree, by the same process and in the same manner as is now or may hereafter be provided by law in the case of judgments of any court of common pleas. A writ of attachment for said purpose may be allowed by said orphans' court, or any judge thereof, as writs of fieri facias in said court are allowed, and may be served out of the county in which the same may be issued; but service on the party against whom such decree was made shall not be required, if he be not found in said county.

NOTE.—This is founded on Section 1 of the Act of March 27, 1873, P L. 49, 3 Purd. 3378. That section refers to the Acts of June 16, 1836, P. L. 767, and April 13, 1843, P. L. 235, Section 10. As such a reference cannot constitutionally be made in the present act, it is recommended that the Act of 1873 be not repealed.

5. Writs of testatum fieri facias may be issued out of any orphans' court, in the same manner that writs of execution in the nature of writs of fieri facias are allowed by this act; and the sheriff, or other officer to whom any such writ is directed, shall proceed to levy and sell the personal property of the person or persons against whom the same shall be issued, in the same manner in all respects, as if such writ had issued out of a court of common pleas.

NOTE.—This is part of Section 2 of the Act of April 21, 1846, P. L. 430, 3 Purd. 3377, eliminating all references to the writ of vend. ex. and to real property, pursuant to the conclusion of the Commissioners that executions against real property should issue from the common pleas only. See paragraph 3, supra, clause (*e*) infra, and Section 51 of the Fiduciaries' Act. This, it seems to the Commissioners, is the logical and convenient arrangement, since, as pointed out in Weyand's Appeal, 62 Pa. 198, 202, a

decree of the orphans' court is, of itself, no lien on real estate, and it is anomalous that a vend. ex. should issue on a judgment which has no lien.

Under Section 51 of the Fiduciaries' Act and under clause (*e*) of the present section, a lien on real estate may be acquired by filing a transcript in the common pleas, where the judgment will be indexed, a matter for which there is no provision in the orphans' court; and it is proper that the execution against real estate should issue from the court where the lien is acquired. In line 3, "allowed by this act" is substituted for "allowed by the 57th section" of the Act of 1832. The remainder of that section validated prior proceedings.

(*b*) 1. Writs of attachment of the person and sequestration shall be directed to and executed by the sheriff or coroner, as the case may require, of the proper county.

NOTE.—This and the following paragraphs of this clause, except where otherwise indicated, are copied from the clauses of Section 57 of the Act of 1832.

2. When any executor, administrator, guardian or trustee shall reside or move out of the county in which his appointment shall have taken place, or shall not possess real or personal estate in such county, sufficient to satisfy any decree or order of the orphans' court of such county, it shall be lawful for the orphans' court of such county to issue process to the county in which such executor, administrator, guardian or trustee may be, or in which he may have any real or personal estate, amenable to such process; and such process shall be executed by the sheriff or coroner, as the case may require, of the county in which such executor, administrator, guardian or trustee may be, or may possess real or personal estate as aforesaid.

NOTE.—This is Clause XXV of Section 57 of the Act of 1832, extended so as to include trustees.

3. Writs of sequestration shall be in the following form:

The Commonwealth of Pennsylvania: To the sheriff of the County of , greeting: Whereas, A. B. (here set out the decree, or so much thereof as is material to explain the duty to be performed). Therefore we command you, that you do, at proper and convenient hours in the day-time, go to and enter upon all the messuages, lands, tenements and real estates of the said A. B., and that you do collect, take and get into your hands, not only the rents, issues and profits of all his said real estates, but also all his goods, chattels and personal estate, and detain and keep the same under sequestration in your hands; and also that you attach all stocks held by him in incorporated companies, and keep the same under attachment, until our said orphans' court shall make other order to the contrary; and you are to return with this writ an inventory or schedule of the property you have sequestered or attached, and a certificate under your hand of the manner in which you shall have executed this writ, to our said court, on the day of next. Witness, etc.

4. A sequestration shall not abate by the death of the complainant or respondent.

5. It shall be the duty of the sheriff or the coroner, as the case may be, immediately after receiving any such writ of sequestration, to file a copy thereof in the office of the prothonotary of the court of common pleas of the same county, who shall, forthwith, enter the substance thereof on his docket, with the names of the parties, and index the same in the judgment index; and the entry thereof shall thenceforward operate to charge the real estate of the respondent, according to the form and effect of such writ, and shall bind the same in the hands of all purchasers and mortgagees, subsequently to such entry, without other notice: *Provided*, That if such sequestration shall be dissolved by the order of the orphans' court, the respondent, or any person interested in such real estate, may have a certificate of the same

from the clerk of the said court, which it shall be the duty of such clerk to furnish, on application, and which, being entered on the docket of said court of common pleas, shall have the effect of a satisfaction of such lien.

NOTE.—This is Clause XV of Section 57 of the Act of 1832, altered by substituting "respondent" for "defendant," by inserting in the next to the last line the words "of said court of common pleas," and by adding the provision for indexing in the judgment index.

6. When proof shall be made, on oath or affirmation, to the satisfaction of the court, or to any judge thereof, at the time of filing the petition as aforesaid, that the respondent has absconded or is about to abscond or depart from his usual place of abode, to the prejudice of the complainant, it shall be lawful for the court, or for such judge, to allow the issuing of a writ of attachment of the person, or a writ of sequestration, or both, in the first instance, against such respondent; and on the return thereof, the like proceedings may be had, as are authorized on the return of a citation.

NOTE.—This is Clause XVII of Section 57 of the Act of 1832. The following changes have been made: In line 2, the words "if in session" have been omitted after "court," and "in vacation" after "thereof." In line 4 and line 9 "respondent" has been substituted for "defendant."

7. If such attachment of the person or sequestration issued in the first instance be executed, the court, or any judge thereof, may dissolve the same, on the respondent giving security to the satisfaction of the court, or of such judge, to appear on a day certain to answer to the petition, and to abide the orders and decrees of the court in the premises.

NOTE.—This is Clause XVIII of Section 57 of the Act of 1832, omitting "in vacation" in line 2, and changing "defendant" to "respondent" in line 3.

8. Any person attached as for contempt in refusing to obey an order or decree of the orphans' court, whether for the payment of money or in any other case, may be discharged from custody by said court on his complying with the order or decree of the court, or paying the money for which such order or decree has been made, or upon his purging himself of contempt to the satisfaction of the court by whose order he was attached.

NOTE.—This is a new clause, introduced to make it plain that such discharge may be made by the orphans' court, and that the respondent need not resort to insolvency proceedings in the court of common pleas. There is a conflict of authority on the question under the existing law. See Baker's Estate, 21 D. R. 177; Ex parte Batdorf, 13 W. N. C. 417.

9. When proof shall be made, on oath or affirmation, to the satisfaction of the court, or of any judge thereof, at the time of presenting a petition, or at any stage of the cause, that the party therein named has in his possession trust property or effects, which he is wasting or otherwise disposing of contrary to his duty and the trust, or that he is about to abscond and to carry such trust property or effects out of the jurisdiction of the court, it shall be lawful for the court, or such judge, to award a writ, in the name of the commonwealth, to the sheriff or coroner, as the case may require, of the proper county, returnable on a day certain, commanding him to take possession of all such trust property and effects specified in such writ, and to hold the same subject to the order of the court, and also to attach all debts due to such trust, whether by bond, mortgage or otherwise, and all stocks in incorporated companies, and serve a copy of such writ upon each debtor, and upon each company in which stock may be held belonging to the trust as aforesaid: *Provided*, That before the execution of such writ, the sheriff or coroner, as the case may be, may require of the party at whose instance such writ may have been issued, sufficient security to indemnify him against any

damages arising from the execution thereof: *And provided also*, That if the party against whom such writ may issue shall give sufficient security to such sheriff or coroner, that the trust property or effects specified in such writ shall be forthcoming at the return thereof, then such sheriff or coroner shall not execute the same, but shall make return of the facts to the court.

NOTE.—This is Clause XIX of Section 57 of the Act of 1832. In line 2, the words "in vacation" are omitted as also in line 9. In line 12, after "day certain" the following words are omitted: "to the orphans' court, to be convened for that purpose, if the said court shall not then be in session."

In line 5, and wherever the words "trust property" appear, the comma between the words, which appears in the Act of 1832, is omitted. It did not appear in the original draft of the Act of 1832.

10. The like proceedings may be had, where the court has made a final order and decree for the delivery of the trust property and effects, by the respondent, to any person who may be designated by law, or by the order of the court, to receive them.

11. On the return of such writ, the court may make such order respecting the disposition of such trust property and effects as may be necessary and proper, according to the principles of justice and equity.

NOTE.—This is Clause XXI of Section 57 of the Act of 1832, 3 Purd. 3377, with the substitution of "make" for "take" in the first line.

12. When a decree shall have been made against any party who shall not have appeared according to the requisitions of the citation, and a sequestration shall have issued against the real or personal estate of such party, the court may order the decree to be satisfied out of the estate and effects sequestered: *Provided*, That such order shall not be carried into execution, until the complainant shall have given security, to the satisfaction of the court, to abide the order of the court, touching

the restitution of what he may have received, in case the respondent shall appear, and be admitted to defend the suit; but if such security shall not be given, the estate and effects sequestered, or the proceeds thereof, shall remain subject to the direction of the court, to abide its further order.

13. If the party, against whom such decree shall have been made, or his representatives, shall, within one year after personal notice of such decree, and within five years after the entry thereof, when no such notice shall have been given, present a petition to the same court, praying to be admitted to be heard, and shall pay such costs as the court shall adjudge, the party so petitioning shall be admitted to a defence, and the case shall then proceed, in like manner as if such party had appeared in due season, and no decree had been made.

14. If such party, or his representatives, shall not, within such period, present a petition as aforesaid, the court may make such final order and decree, both in respect to any estate or effects that may have been sequestered and in respect to the matters in controversy in the case, as may be according to justice and equity; and may, if necessary, award a writ in the nature of a fieri facias, in the manner hereinbefore provided, as in the case where the party appears.

(*c*) Each of the orphans' courts shall have power to award process, to levy and recover such fines, forfeitures and amercements as shall be imposed, taxed or adjudged by them respectively.

NOTE.—This is Section 20 of the Act of June 16, 1836, P. L. 792, 3 Purd. 3370, limited to the orphans' court.

(*d*) Writs of fieri facias shall be directed to, and executed by the sheriff or coroner, as the case may require, of the proper county, and the proceedings thereon shall

be the same as on writs of fieri facias against personal property issued by the court of common pleas of the same county.

NOTE.—This is Clause XVI of Section 57 of the Act of 1832, 3 Purd. 3376, altered by inserting the words "against personal property."

(*e*) 1. It shall be the duty of the prothonotaries of the courts of common pleas to file and docket, whenever the same shall be furnished by any parties interested, certified transcripts of any definitive orders of the orphans' court of the same or any other county upon parties other than fiduciaries, to pay certain sums of money, which transcripts, so filed, shall constitute judgments, which shall be liens against the real estate of the persons ordered to pay from the time of such entry until payment, distribution or satisfaction. Executions may be issued thereon out of said court of common pleas against the real estate only of such persons, by any party or parties interested, for the recovery of so much as may be due to them respectively. The liens of such judgments shall cease at the expiration of five years from the time of the entry aforesaid, unless revived by scire facias in the manner by law directed in the cases of judgments of the courts of common law.

In case of an appeal from the orphans' court, the judgment shall be for no more than the amount finally decreed by the appellate court to be due; and it shall be the duty of the prothonotary of the common pleas, on such decree of the appellate court being certified to him, to enter on his docket the amount so found due and decreed by the appellate court. If such amount be greater than that decreed by the orphans' court, the judgment for such excess shall take effect only from the time of entering the decree of the appellate court; but if the amount be reduced by the final decree of the appellate court, the prothonotary shall reduce the amount originally entered on his judgment docket and index accordingly; and such final decree, upon appeal,

being certified and filed in said court of common pleas, the said term of five years shall be counted from the time of such entry.

NOTE.—This is founded on Section 51 (*a*) of the Fiduciaries Act, which relates to the certification of balances due by fiduciaries or amounts ordered to be paid by them. The present section is intended to cover the certification of decrees against other persons for the payment of money. It being provided by clause (*a*) 3 of the present section that only personal property may be sold under execution from the orphans' court, this clause is necessary in order to provide a method of selling real estate.

The phraseology covers the provisions as to filing transcripts in other counties contained in the Act of June 5, 1885, P. L. 78, 2 Purd. 1426, which is recommended for repeal so far as it relates to orders and decrees of the orphans' court.

2. When the person liable shall have fully paid and discharged the amount of such judgment, the parties who have received payment shall acknowledge satisfaction thereof, on the record of the court of common pleas. In case of neglect or refusal so to do, for the space of thirty days after request in writing and tender of all the costs, the orphans' court, on due proof to them made that the entire amount due from such person, according to the order of the orphans' court, has been fully paid and discharged, may make an order for his release from such recorded judgment, which order, being certified to the court of common pleas, shall be entered on their records and shall operate as a full satisfaction and discharge of such judgment.

NOTE.—This is founded on Section 51 (*b*) of the Fiduciaries Act.

SECTION 19. The fees to be taken by the sheriffs of each county for the services enjoined by this act shall be the same as those allowed for like services; and for executing a writ of sequestration the same fees shall be allowed as upon a writ of foreign attach-

ment, together with reasonable costs and expenses, according to the discretion of the court. On all writs and process sent from another county, no mileage shall be allowed, except for the distance actually traveled, but an allowance shall be made for the transmission of such writs and process, to the clerk of the court from which they may have issued, at the common rates of postage.

NOTE.—This is Section 60 of the Act of March 29, 1832, P. L. 213, 3 Purd. 3385, except that, in line 3, the word "already" is omitted before "allowed."

SECTION 20 (*a*) Each of the orphans' courts of this commonwealth is empowered to issue writs of subpoena, under its official seal, into any county of this commonwealth, to summon and bring before the respective court, any person to give testimony in any cause or matter depending before it, under the penalties that are or shall be appointed and allowed in any such case by the laws of this commonwealth.

NOTE.—This is Section 22 of the Act of June 16, 1836, P. L. 793, 3 Purd. 3370, which relates to the other courts as well as the orphans' court.

"Its" and "it" have been substituted for "their" and "them," and "that are or shall be" for "hitherto" after "penalties."

(*b*) 1. In all proceedings begun by petition, where an issue of fact is raised, it shall be within the discretion of the orphans' court, by general rule or by special order in the case, to provide for the reference of the case to a master to take the testimony and report his findings and his recommendations as to a decree, or to provide for the taking of depositions before a notary public or other official authorized to administer oaths and affirmations, or to provide for the taking of testimony before a judge of said court. The office of examiner in the orphans' court, appointed merely for the purpose of taking testimony, is hereby abolished, except in the cases mentioned in paragraph 3 of this

clause, and except in cases where, at the time of the approval of this act, examiners have been appointed and are still in office.

NOTE.—This is a new clause, framed to do away with the taking of testimony before an examiner without power to rule on offers of testimony or to recommend a decree, and to substitute the appointment of a master or the taking of depositions on rule before any official authorized to administer oaths.

2. Every orphans' court of this commonwealth shall have power to make rules regulating the taking of depositions of aged, infirm and going witnesses, and the issuance and execution of commissions to take testimony and letters rogatory.

NOTE.—This clause is also new, but is declaratory of the present law.

3. Where the testimony of any witness is desired to be read in evidence in any proceeding now or hereafter pending in any orphans' court of this commonwealth, and such witness resides in any other state, territory or possession of the United States of America, or in any foreign country, the court may, on the application of any party, provide for the taking, in such other state, territory, possession or foreign country, of the testimony of such witness or witnesses orally, before an examiner appointed by the court, or before any person authorized by the laws of such other state, territory, possession or foreign country to administer oaths. In granting any such application the court may impose such terms as it shall deem proper, as to the payment by the party applying therefor of the costs and expenses involved, including reasonable counsel fees and traveling expenses, and may prescribe the notice to be given and the time within which such testimony shall be taken.

NOTE.—This is founded on Section 1 of the Act of June 8, 1911, P. L. 709, 5 Purd. 6091, which relates to "any of the civil courts of this commonwealth."

(*c*) The orphans' court shall have power to compel the production of any books, papers or other documents, necessary to a just decision of the question before them, or before an auditor or master.

NOTE.—This is the last part of Section 56 of the Act of 1832, P. L. 208, 3 Purd. 3380.

The first part of that section conferred the right to cross-examine parties in the orphans' court as though they were made defendants in a bill in equity for discovery, which provision is now obsolete in view of the later general acts on the subject.

(*d*) Every orphans' court of this commonwealth shall have the jurisdiction and powers of a court of chancery, so far as relates to the perpetuation of testimony in all cases, including cases of lost or destroyed records of such court, whether such records were lost or destroyed before or after the passage of this act, and the same proceedings, orders, decrees and judgments shall be had under this section, mutatis mutandis, as in cases now authorized by law, and with the like effect; and when proved, such records shall have the same legal operation as the original records would have had. Notice of any proceeding under this clause shall be given to all persons interested, or their guardians or committees.

NOTE.—This is founded on Section 1 of the Act of April 1, 1863, P. L. 205, 3 Purd. 3385, which, however, is limited to cases of lost or destroyed records. The first proviso of that section has been omitted, its substance being covered by a modification of the phraseology of the first part of the clause, and the last sentence has been substituted for the provision that notice shall be served upon "minors and their guardians."

(*e*) 1. On appeal from the decision of any register of wills, or in proceedings removed from any register of wills by certification, the orphans' court shall hear the testimony de novo, unless all parties appearing in the proceeding shall agree that the case shall be heard on the testimony taken before such register: *Provided*, That in all cases the court shall have power to require the

production before it, for examination, of the witnesses already examined, or of any other witnesses.

NOTE.—This is a new clause, introduced in order to remove any possible doubt as to the procedure in such cases.

2. The testimony of all witnesses examined in any cause litigated before any orphans' court on appeal from any register of wills, or on removal from any register of wills by certification, shall be taken in writing and made a part of the proceedings therein, upon which testimony the court having jurisdiction of such cause by appeal may affirm, reverse, alter or modify the decree of the orphans' court.

NOTE.—This is founded on Section 40 of the Act of March 15, 1832, 4 Purd. 4086, which was derived from Section 18 of the Act of April 13, 1791, 3 Sm. L. 28; the Act of 1832, however, referred to the register's court.

The words "on appeal from any register of wills, or on removal from any register of wills by certification," have been inserted to show that the paragraph does not apply to other proceedings in the orphans' court.

SECTION 21 (*a*) The orphans' court shall have power to send an issue to the court of common pleas of the same county for the trial of facts by jury, whenever they shall deem it expedient so to do.

NOTE.—This is Section 55 of the Act of March 29, 1832, P. L. 208, 3 Purd. 3378.

(*b*) Whenever a dispute upon a matter of fact arises before any orphans' court, on appeal from any register of wills or on removal from any register of wills by certification, the said court shall, at the request of either party, direct a precept for an issue to the court of common pleas of the county for the trial thereof, which, in the case of an issue devisavit vel non, shall be substantially in the following form: (L. S.) County, ss. The Commonwealth of Pennsylvania: To the judges of the

court of common pleas of the said county, greeting: Whereas, A. B., on the day of , in the year, etc., presented to G. H., our register of wills of said county, for probate, a certain writing hereto annexed, purporting to have been made the day of , in the year, etc., (or otherwise describing the paper in question),which said writing the said A. B. avers is the last will and testament of the said C. D., and whereas E. D., who is a son and heir of the said C. D. (or intermarried with F. D., who is a daughter and heir, etc., according to the fact), hath objected before our said register that the said writing was procured by duress and constraint (stating the matters of fact objected), and whereas our said register hath admitted (or refused to admit) said writing to probate as the last will and testament of the said C. D., and whereas the said E. D. hath appealed from the decree of our said register to our orphans' court for the said county (or as the case may be) and whereas the said E. D. (or A. B.) hath requested that an issue may be directed into our said court of common pleas to try by a jury the validity of the said writing, and the matters of fact which may be objected thereto in our said court; therefore, we command you that you cause an action to be entered upon the records of our said court, as of the day of the delivery of this our precept into the office of the prothonotary of our said court, between the said A. B. and the said E. D., so that an issue therein may be formed upon the merits of the controversy between the said parties, and tried in due course according to the practice of our said courts in actions commenced by writ; and further, that you cause all other persons who may be interested in the estate of the said C. D., as heirs, relations or next of kin, devisees, legatees or executors, to be warned, so that they may come into our said court and become party to the said action, if they shall see cause, and that you certify the result of the trial so had in the premises into our said orphans' court. Attest. I. J., President Judge of the Orphans' Court of the said county.

Where the issue directed is other than an issue devisavit vel non, the foregoing form shall be changed, so far as necessary, in accordance with the circumstances of the case.

And the facts established by the verdict returned shall not be re-examined in any appeal.

NOTE.—This is Section 41 of the Act of March 15, 1832, 4 Purd. 4088, with the substitution of "orphans' court" for "register's court," and the insertion of the words beginning "on appeal" and ending "certification," in order to show that the section applies only to cases coming up from the register.

Section 41 of the Act of 1832 refers to the form of precept prescribed for issuance by the register. Since this form is embodied in the new Register of Wills Act, a similar reference cannot be made in the present section, and the form is therefore set forth at length, with the proper changes for an issue *devisavit vel non.*

(*c*) 1. Before an issue shall be directed upon the distribution of money arising from any sale of real estate made under order of the orphans' court, the applicant for such issue shall make affidavit that there are material facts in dispute therein, and shall set forth the nature and character thereof, upon which affidavit the court shall determine whether such issue shall be granted, subject to appeal by such applicant, if the issue be refused, in like manner as in other cases in which such appeal is or may be allowed by law.

NOTE.—This is the proviso to Section 2 of the Act of April 20, 1846, P. L. 411, 3 Purd. 3379, which applies also to "sales under execution." While the subject-matter of this clause is probably covered by clause (*a*) of the present section, the Commissioners have concluded to recommend its inclusion. The section of the Act of 1846 is not recommended for repeal except so far as it relates to the orphans' court.

The following changes have been made: In lines 2 and 3, "any sale of real estate made under order of the orphans' court" has been substituted for "orphans' court sales." In line 8, "a writ of error or" has been omitted before "appeal," and, at the end, "appeal is or may be allowed by law" has been substituted for "writ now lies."

2. Upon granting any such issue, it shall be discretionary with the court, upon the application of the party or parties appearing, by the record, prima facie entitled to the said fund, to order the same to be invested, pendente lite, in investments allowed by law in the case of trustees.

NOTE.—This is Section 3 of the Act of April 20, 1846, P. L. 411, 3 Purd. 3380, which, like Section 2 of that act, is to be repealed only so far as it relates to the orphans' court. In line 2, after "court," these words are omitted: "so soon as the money arising from such sale shall have been paid into court." At the end, "investments allowed by law in the case of trustees" has been substituted for "the debt of the United States, or some other sufficient security, subject to the decree of the court."

SECTION 22 (*a*) Any party aggrieved by the definitive sentence or decree of any orphans' court, or his legal representatives, may appeal therefrom to the proper appellate court within six months from the time of pronouncing such final sentence or decree: *Provided*, That no appeal from any decree of such court, concerning the validity of a will, or the right to administer, shall suspend the powers or prejudice the acts of any executor or administrator to whom letters have been granted: *And provided further*, That no reversal or modification of any decree or proceedings of the orphans' court, for the sale of real estate, shall have the effect of divesting any estate or interest acquired under such decree or proceeding, by persons not party thereto, where the orphans' court had jurisdiction of the case.

NOTE.—This is founded on Section 42 of the Act of March 15, 1832, 4 Purd. 4092, and Section 59 of the Act of March 29, 1832, P. L. 213, 3 Purd. 3383–4. The former section relates to appeals from the register's court in cases where the sum in controversy exceeds $150, and provides that the powers of an executor shall not be suspended by an appeal if he gives sufficient security to the register for the faithful administration of his trust, and that on his refusal to give security the register shall grant letters of administration during the dispute, which shall suspend the power of the executor during that time. In that section, the period for appeal is one year. The provisions

which are omitted in the present draft seem unnecessary in view of the provisions of the Fiduciaries Act as to the requiring of security and the granting of letters pendente lite.

The first proviso of Section 59 of the Act of March 29, 1832, and Section 8 of the Act of May 19, 1874, P. L. 206, are omitted, having been repealed by Section 22 of the general appeals Act of May 19, 1897, P. L. 72.

(*b*) The supreme and superior courts of this commonwealth shall, in all cases of appeal from the definitive sentence or decree of the orphans' court, hear, try and determine the same as to right and justice may belong, and decree according to the equity thereof; and may refer the same to auditors when, in their discretion, they may think proper.

NOTE.—This is a combination of Section 4 of the Act of April 14, 1835, P. L. 276, 3 Purd. 3384, and Section 2 of the Act of June 16, 1836, P. L. 683, 3 Purd. 3385, extended so as to include the superior court.

SECTION 23. This act shall be known and may be cited as the Orphans' Court Act of 1917.

SECTION 24. The following acts and parts of acts of assembly are repealed as respectively indicated. The repeal of the first section of an act shall not repeal the enacting clause of such act.

Sections 1, 8 and 9 of an act entitled "An Act for establishing orphans' courts," passed March 27, 1713, 1 Sm. L. 81, absolutely.

Sections 5, 6 and 18 of an act entitled "An Act to establish the judicial courts of this commonwealth, in conformity to the alterations and amendments in the constitution," passed April 13, 1791, 3 Sm. L. 28, absolutely.

Section 24 of an act entitled "An Act directing the descent of intestates' real estates, and distribution of their personal estates, and for other purposes therein mentioned," passed April 19, 1794, 3 Sm. L. 143, absolutely.

Sections 40, 41 and 42 of an act entitled "An Act relating to registers and registers' courts," approved March 15, 1832, P. L. 135, absolutely.

Sections 1 to 4 inclusive, 52, and 55 to 60 inclusive of an act entitled "An Act relating to orphans' courts," approved March 29, 1832, P. L. 190, absolutely.

Sections 52 to 57 inclusive of an act entitled "An Act relative to the organization of the courts of justice," approved April 14, 1834, P. L. 341, absolutely.

Section 4 of an act entitled "Supplement to the act passed the twenty-ninth day of March, Anno Domini, one thousand eight hundred and thirty-two, entitled 'An Act relating to orphans' courts,'" approved April 14, 1835, P. L. 275, absolutely.

Section 2 of an act entitled "An Act supplementary to the various acts relating to orphans' and registers courts, and executors and administrators, and the act relating to the measurement of grain, salt, and coal," approved June 16, 1836, P. L. 682, absolutely.

Section 19 of an act entitled "An Act relating to the jurisdictions and powers of courts," approved June 16, 1836, P. L. 784, absolutely, and Sections 20, 21 and 22 of the same act in so far as they relate to the orphans' court.

Section 8 of an act entitled "An Act to confer upon the orphans' court of Lancaster County certain powers in relation to the real estate of John Lindemuth, deceased, and for other purposes," approved April 4, 1843, P. L. 131, in so far as it relates to the orphans' court.

Sections 2 and 3 of an act entitled "An Act relative to lien creditors becoming purchasers at judicial sales, and for other purposes," approved April 20, 1846, P. L. 411, in so far as they relate to the orphans' court.

Section 2 of an act entitled "A further supplement to an act, entitled, 'An Act relating to executions,' passed the sixteenth day of June, one thousand eight hundred and thirty-six," approved April 21, 1846, P. L. 430, absolutely.

Section 18 of an act entitled "An Act relating to the

bail of executrixes; to partition in the orphans' court and common pleas; to colored convicts in Philadelphia; to the limitation of actions against corporations; to actions enforcing the payment of ground rent; to trustees of married women; to appeals from awards of arbitrators by corporations; to hawkers and pedlers in the counties of Butler and Union; to the payment of costs in actions by informers in certain cases; to taxing lands situate in different townships; and in relation to fees of county treasurers of Lycoming, Clinton and Schuylkill; to provide for recording the accounts of executors, administrators, guardians and auditors' reports; and to amend and alter existing laws relative to the administration of justice in this commonwealth," became a law April 25, 1850, by reason of the Governor's failure to return it within ten days, P. L. 569, absolutely.

Section 1 of an act entitled "An Act relating to official seals," approved March 6, 1854, P. L. 155, in so far as it relates to the orphans' court.

An act entitled "An Act relative to the perpetuation of testimony in cases of lost records," approved April 1, 1863, P. L. 205, absolutely.

Sections 2, 3, 4, and 6 to 10 inclusive of an act entitled "An Act relating to the organization and jurisdiction of orphans' courts, and to establish a separate orphans' court in and for counties having more than one hundred and fifty thousand inhabitants, and to provide for the election of judges thereof," approved May 19, 1874, P. L. 206, absolutely.

An act entitled "An Act authorizing the holding of orphans' courts by other than the regularly commissioned judges in certain cases," approved March 4, 1875, P. L. 5, absolutely.

An act entitled "An Act relating to orphans' courts," approved March 18, 1875, P. L. 29, absolutely.

An act entitled "An Act authorizing the president or additional law judges of the courts of common pleas to hold courts of quarter sessions, and oyer and terminer and orphans' courts, in certain cases," approved April

7, 1876, P. L. 19, in so far as it relates to the orphans' court.

An act entitled "An Act to provide for the appointment of a president judge of the separate orphans' courts, and to provide for the commission thereof," approved May 24, 1878, P. L. 131, absolutely.

An act entitled "An Act to regulate the compensation of auditors and commissioners," approved June 4, 1879, P. L. 84, in so far as it relates to auditors and commissioners appointed by the orphans' court.

An act entitled "An Act to amend section three of the act of assembly of May nineteenth, one thousand eight hundred and seventy-four, entitled 'An Act relating to the organization and jurisdiction of orphans' courts, and to establish a separate orphans' court in and for the counties having more than one hundred and fifty thousand inhabitants, and to provide for the election of judges thereof, fixing the salaries of judges of separate orphans' courts,'" approved June 13, 1883, P. L. 91, absolutely.

An act entitled "An Act relative to the transfer of orders and decrees for the payment of money for the purpose of lien and execution into other counties than those where they were originally rendered," approved June 5, 1885, P. L. 78, in so far as it relates to orders and decrees of the orphans' court.

An act entitled "An Act relative to the granting of citations and rules to show cause, by the courts of this commonwealth," approved May 7, 1889, P. L. 102, in so far as it relates to the orphans' court.

An act entitled "An Act requiring all public records within this commonwealth to be kept in the English language," approved May 31, 1893, P. L. 188, in so far as it relates to papers filed or recorded in the orphans' court or the office of the clerk thereof.

An act entitled "An Act to authorize the judges of separate orphans' courts to hear and determine proceedings in equity, at the request of the judges of the common pleas," approved April 18, 1905, P. L. 208, absolutely.

An act entitled "An Act authorizing the parties in interest, or their counsel, to select auditors and masters needed in judicial proceedings; except in divorce cases," approved April 1, 1909, P. L. 95, in so far as it relates to proceedings in the orphans' court.

An act entitled "An Act to provide for the taking of testimony to be used in any of the civil courts of record in this commonwealth of witnesses residing in any other state or in any foreign country," approved June 8, 1911, P. L. 709, in so far as it relates to the orphans' court.

An act entitled "An Act to authorize the judges of separate orphans' court, at the request of the judges of the common pleas, to hear and determine all issues in the court of common pleas, courts of oyer and terminer and general jail delivery, and courts of quarter sessions of the peace," approved July 19, 1913, P. L. 844, absolutely.

An act entitled "An Act to authorize the judges of the courts of common pleas, of judicial districts having separate orphans' courts, to hear and determine all matters in such courts, at the request of the judges thereof," approved April 21, 1915, P. L. 156, absolutely.

All other acts of assembly, or parts thereof, that are in any way in conflict with this act, or any part thereof, are hereby repealed.